[Billing Code: 6750-01-S]

FEDERAL TRADE COMMISSION

16 CFR Part 322

[RIN 3084-AB18]

NOTICE OF PROPOSED RULEMAKING: MORTGAGE ASSISTANCE RELIEF SERVICES

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice of Proposed Rulemaking; request for public comment.

SUMMARY: Pursuant to the 2009 Omnibus Appropriations Act (Omnibus Appropriations Act), which was later clarified by the Credit Card Accountability and Responsibility and Disclosure Act of 2009 (Credit CARD Act), the Commission issues a Notice of Proposed Rulemaking (NPRM) concerning the practices of for-profit companies that, in exchange for a fee, offer to work with lenders and servicers on behalf of consumers to modify the terms of mortgage loans or to avoid foreclosure on those loans. The proposed Rule published for comment, among other things, would: (1) prohibit providers of these services from making false or misleading claims; (2) mandate that providers disclose certain information about these services; (3) bar the collection of advance fees for these services; (4) prohibit persons from providing substantial assistance or support to an entity they know or consciously avoid knowing is engaged in a violation of these Rules; and (5) impose recordkeeping and compliance requirements.

DATES: Comments must be received by March 29, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Comments in electronic form should be submitted at *http://public.commentworks.com/ftc/MARS-NPRM* (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex W), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in the SUPPLEMENTARY INFORMATION section below.

FOR FURTHER INFORMATION CONTACT: Laura Sullivan, Evan Zullow, or Robert Mahini, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

On March 11, 2009, President Obama signed the Omnibus Appropriations Act.[1] Section 626 of this Act directed the Commission to commence, within 90 days of enactment, a rulemaking proceeding with respect to mortgage loans.[2] Section 626 also directed the FTC to use notice and comment rulemaking procedures under Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553.[3]

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[1] 2009 Omnibus Appropriations Act, Pub. L. 111-8, 123 Stat. 524.

[2] *Id.* § 626(a).

[3] *Id.* Because Congress directed the Commission to use these APA rulemaking procedures, the FTC will not use the procedures set forth in Section 18 of the FTC Act,

On May 22, 2009, President Obama signed the Credit CARD Act.[4] Section 511 of this act clarified the Commission's rulemaking authority under the Omnibus Appropriations Act. First, Section 511 specified that the rulemaking "shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services."[5] The Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not specify any particular types of provisions that the Commission should or should not include in a rule addressing loan modification and foreclosure rescue services but rather directs the Commission to issue rules that "relate to" unfairness or deception.[6] Accordingly, the Commission interprets the Omnibus Appropriation Act to allow it to issue rules prohibiting or restricting conduct that may not be unfair or deceptive itself but would be reasonably related to the goal of preventing unfairness or deception.[7]

Second, Section 511 of the Credit CARD Act clarified that the Commission's rulemaking authority was limited to entities that are subject to enforcement by the

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15 U.S.C. 57a.

4 Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, 123 Stat. 1734 (Credit CARD Act).

5 *Id.* § 511(a)(1)(B).

6 *Id.*

7 Unlike Section 18 of the FTC Act, 15 U.S.C. 57, the Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not require that the Commission identify with specificity in the rule the unfair or deceptive acts or practices that the prohibitions will prevent. Omnibus Appropriations Act § 626(a); Credit CARD Act § 511(a)(1)(B); *see also Katharine Gibbs Sch. v. FTC*, 612 F.2d 658 (2d Cir. 1979).

Commission under the FTC Act.[8] The rules the Commission promulgates to implement the Omnibus Appropriations Act, therefore, cannot cover the practices of banks, thrifts, federal credit unions,[9] or certain nonprofits.[10]

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, also permits both the Commission and the states to enforce the rules the FTC issues.[11] The Commission can use its powers under the FTC Act to investigate and enforce the rules, and the FTC can seek civil penalties under the FTC Act against those who violate the rules. In addition, states can enforce the rules by bringing civil actions in federal district court or another court of competent jurisdiction to obtain civil penalties and other relief. Before bringing such an action, however, states must give 60 days advance notice to the Commission or other "primary federal regulator"[12] of the proposed defendant, and the regulator has the right to intervene in the action.

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8 Credit CARD Act § 511(a)(1)(B).

9 15 U.S.C. 45(a)(2).

10 15 U.S.C. 44. Bona fide nonprofit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. 15 U.S.C. 44, 45(a)(2). The FTC does, however, have jurisdiction over for-profit entities that provide mortgage-related services as a result of a contractual relationship with a nonprofit organization. *See Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 334-35 (4th Cir. 2005). In addition, the Commission asserts jurisdiction over "sham charities" that operate as for-profit entities in practice. *See infra* note 112 and accompanying text.

11 Omnibus Appropriations Act § 626; Credit CARD Act § 511(a)(1)(B).

12 Note, however, that most mortgage assistance relief service (MARS) providers likely will fall within the jurisdiction of the FTC.

B. The Advance Notice of Proposed Rulemaking

On June 1, 2009, the Commission published in the FEDERAL REGISTER an Advance Notice of Proposed Rulemaking (ANPR) addressing the acts and practices of for-profit companies that offer to work with lenders or servicers on behalf of consumers seeking to modify the terms of their loan or to avoid foreclosure on the loan.[13] The ANPR described these services generically as "Mortgage Assistance Relief Services," and the rulemaking proceeding was entitled the Mortgage Assistance Relief Services (MARS) Rulemaking.[14] The MARS ANPR sought public comment on: (1) the mortgage assistance relief services industry; (2) unfair or deceptive acts or practices in which providers of these types of services are engaged; and (3) prohibitions and restrictions on providers of these services that are needed to prevent harm to consumers.[15]

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[13] *Mortgage Assistance Relief Services*, 74 FR 26130 (June 1, 2009) (*MARS ANPR*).

[14] *Id.* On the same date, the Commission issued another ANPR, the Mortgage Acts and Practices Rulemaking, which addresses more generally activities that occur throughout the life-cycle of mortgage loans, *i.e.*, practices with regard to the marketing, advertising, and servicing of mortgage loans. *Mortgage Acts and Practices*, 74 FR 26118 (June 1, 2009). The Commission anticipates that it will publish an NPRM relating to other mortgage practices in the near future.

[15] *MARS ANPR*, 74 FR at 26137-38. The Credit CARD Act requires the FTC to consult with the Federal Reserve Board (Board) concerning any portion of the proposed Rule that addresses acts or practices covered under the Truth in Lending Act, 15 U.S.C. 1601-1667f. Credit CARD Act § 511(a)(1)(B). In this rulemaking, the Commission has consulted with and will continue to consult with the Board and, as appropriate, other federal banking agencies.

In response to the ANPR, the Commission received a total of 46 comments.[16] Forty-six state attorneys general, federal banking agencies, consumer advocacy groups, nonprofit MARS providers, and mortgage lenders and brokers filed individual or group comments. In addition, a few comments were received from entities on behalf of the for-profit MARS providers that the Rule would cover.[17]

The institutional comments the FTC received overwhelmingly supported the issuance of a rule governing the activities of MARS providers.[18] Notably, a wide

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[16] The comments are available at *http://www.ftc.gov/os/comments/mars/index.shtm*. In addition, a list of commenters cited in this Notice, along with their short citation names or acronyms used throughout the Notice, is attached to this Notice as Appendix A.

[17] One of these comments was from The National Loss Mitigation Association (TNLMA), which claims to be "the premier national association" advocating for the for-profit MARS industry. *See* TNLMA at 1. The Commission has alleged that TNLMA is controlled by a named defendant in an on-going FTC law enforcement action. *See FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC(ANX) (C.D. Cal. filed July 13, 2009).

[18] *See, e.g.*, NAAG at 2 ("With a nationwide rule, states could bring actions in federal court to stop violators from operating in any jurisdiction."); MA AG at 2 ("We applaud . . . [the FTC's] current step toward regulating foreclosure-rescue and advance-fee schemes."); MN AG at 4 ("Although several states, including Minnesota, have passed laws regulating loan modification and/or foreclosure rescue companies, a national rule targeting such companies would be beneficial . . . ."); OH AG at 2 ("[O]ur office believes that a national rule targeting rescue companies is needed."); CRC at 1 ("[We] strongly urge the FTC to develop effective rules to address the new cottage industry of fee for service loan modification providers.); NCLC at 2 ("We urge the FTC to enact strong rules to end abusive and deceptive practices by for-profit mortgage assistance relief companies."); CMC at 1 ("The CMC strongly supports the concept of prohibiting specific unfair or deceptive practices of MARS providers."); Chase at 1 ("Chase strongly supports the proposed regulations because it has witnessed MARS entities engage in patterns of abusive and deceptive practices to the detriment of borrowers . . . ."); NCRC at 4 ("The FTC should act aggressively to promulgate a rule with all possible haste."); OTS at 1 (stating its support of "FTC efforts in this important area"); HPC at 1 ("HPC supports issuance of a rule directed at mortgage relief providers."); Shriver at 4 ("[W]e commend the FTC on the proposed regulation . . . .").

spectrum of these commenters, including 46 state attorneys general, consumer and community organizations,[19] and financial service providers,[20] strongly urged the Commission to propose a rule prohibiting or restricting the collection of fees for mortgage relief services until the promised services have been completed.[21] Additionally, a majority of the comments expressed concern regarding pervasive deception and abuse observed in the marketing of MARS, including the failure of MARS

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[19] *See, e.g.*, CRC at 4 ("Banning advance fees is a crucial component to any effort to reduce . . . unfair and deceptive practices in the loan modification industry and will likely push many scam artists out of our communities. The FTC should ban the collection of advance fees outright . . . ."); NCLC at 5 ("NCLC encourages the FTC to ban mortgage assistance relief services from seeking up-front payments. Prohibiting up-front payments will curb the injury and unfairness caused when companies take large payments from borrowers and fail to obtain loan modifications on their behalf, whether the outfit is an outright scam or merely ineffective."); Shriver at 2 (recommending prohibition on up-front fees); NCLR at 1 (recommending that up-front fees be banned).

[20] *See, e.g.*, CMC at 8 ("The CMC would support a ban or limitation on the collection of advance fees by MARS providers."); Chase at 3 ("[T]he payment of advance fees should be banned because there is no guarantee the MARS provider will be successful . . . ."); AFSA at 6 ("[U]p-front fees should be restricted, fees should be reasonable, and only be permitted where services were actually provided"); HPC at 2 (arguing that consumers should not be required to pay up-front fees).

[21] *See, e.g.*, NAAG at 9 ("A ban on advance fees . . . is necessary for any meaningful mortgage consultant regulation . . . . A key provision of any rule regulating mortgage consultants is that no fee may be charged or collected until after the mortgage consultant has fully performed each and every service the mortgage consultant contracted to perform or represented that he or she would perform."); MN AG at 4 ("The only way to ensure that loan modification and foreclosure rescue companies are working for the benefit of the distressed homeowner is to ban the collection of any fees until all promised services have been performed."); MA AG at 2 (urging the Commission to "[b]an advance-fee schemes related to foreclosure assistance"); *see also* NYC DCA at 4 ("The FTC rulemaking should ban foreclosure rescue services from collecting up-front fees from consumers. Collecting fees in advance gives these businesses an easy opportunity to swindle consumers by failing to provide adequate service, or not providing any service at all."); OH AG at 3-4 ("A prohibition or low fee cap on up-front fees is of primary importance in regulating foreclosure rescue services.").

providers to perform promised services[22] and their misrepresentation of affiliation with the government, nonprofits, lenders, or loan servicers.[23]

II. Mortgage Assistance Relief Services

A. The Mortgage Crisis and Assistance for Consumers

As discussed in the ANPR, historic levels of consumer debt, increased unemployment, and a stagnant housing market have contributed to high rates of mortgage loan delinquency and foreclosure.[24] As a result, many consumers struggling to make their mortgage payments are in search of ways to avoid foreclosure. There are a number of options that may be available to consumers, including: (1) short sales or deeds-in-lieu of foreclosure transactions in which the proceeds of a sale of the home or the receipt of the deed to the home is treated as repayment of the outstanding mortgage balance; (2) forbearance or repayment plans that do not reduce the amount that consumers pay but give them more time to bring their payments current; and (3) loan modifications to reduce the amount of consumers' monthly payments. Because loan modifications allow

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22 *See, e.g.*, NCLC at 5; NAAG at 4; MN AG at 1-2.

23 *See, e.g.*, NCLC at 3; OH AG at 4; ABA at 7; Chase at 3.

24 Delinquency and foreclosure start rates are at record highs. In the third quarter of 2009, the Mortgage Bankers Association's quarterly National Delinquency Survey found that 14.41% of all mortgage loans were either in foreclosure or delinquent by at least one payment, the highest percentage recorded in the survey's history. Mortgage Bankers Association, *Delinquencies Continue to Climb in Latest MBA National Delinquency Survey* (Nov. 19, 2009), *available at http://www.mbaa.org/NewsandMedia/PressCenter/71112.htm*. In December 2008, Credit Suisse Bank forecasted a total of 9 million foreclosures for the period 2009 through 2012. *See* Credit Suisse Fixed Income Research 2 (2008), *available at http://www.chapa.org/pdf/ForeclosureUpdateCreditSuisse.pdf*; *see also* NAAG at 2 ("An estimated 8.1 million mortgages are anticipated to be in foreclosure within the next four years.").

consumers to stay in their homes and reduce their overall debt, this possible solution often has great appeal to consumers. The Commission's law enforcement actions suggest that loan modifications may currently be the most frequently marketed and sold mortgage assistance relief service.[25]

In response to the recent mortgage crisis, a number of government and private sector programs have been initiated to assist distressed homeowners in modifying or refinancing their mortgages.[26] In March 2009, for example, the Obama Administration launched the Making Home Affordable (MHA) program, which provides mortgage owners and servicers with financial incentives to modify and refinance loans.[27] More than 650,000 loans have been modified pursuant to this program.[28] In addition, state and local governments, nonprofit organizations, housing counselors, and private sector

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[25] *See* Appendix B (list of FTC actions against MARS providers).

[26] Section II.C of the ANPR described the ongoing federal, state, and local efforts to educate consumers, to assist consumers in working with their lenders and servicers, and to make loan modifications available to a larger number of consumers struggling to stay current on their mortgage. *See MARS ANPR*, 74 FR at 26135-36.

[27] For example, the program offers servicers that modify loans according to its guidelines an up-front fee of $1,000 for each modification,"pay for success" fees on still-performing loans of $1,000 per year, and one-time bonus incentive payments of $1,500 to lender/investors and $500 to servicers for modifications made while a borrower is still current on mortgage payments. U.S. Dep't of Treasury, *Making Home Affordable Summary of Guidelines* 2, *available at http://www.treas.gov/press/releases/reports/guidelines_summary.pdf*.

[28] Renae Merle, *Lenders to Get Push to Help Homeowners*, Wash. Post, Nov. 29, 2009, at A4, *available at http://www.washingtonpost.com/wp-dyn/content/article/2009/11/28/AR2009112802436.html.*

entities have offered a variety of other programs and services to help homeowners in distress.[29]

Despite these public and private efforts, consumers continue to seek assistance from for-profit companies in obtaining loan modifications. Many consumers who are seeking loan modifications are not eligible for the MHA program or other government and private assistance programs. For example, while the Department of the Treasury has estimated that the MHA program will help 3-4 million borrowers by February 2012,[30] industry surveys report that roughly 7.5 million households are at least 30 days behind on their mortgage payments or already are in foreclosure.[31] Even among consumers who may be eligible for the program, it appears many are failing to meet other requirements necessary to qualify for a permanent loan modification.[32] In addition, even if consumers

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[29] *See, e.g.*, FTC, *Mortgage Payments Sending You Reeling? Here's What to Do*, *available at http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.pdf* (2009) (describing various credit counselor alternatives); *Foreclosure Prevention Workshops for Consumers*, *available at http://www.freddiemac.com/avoidforeclosure/workshops.html* (last visited Dec. 22, 2009) (describing local credit counseling events by local governments, nonprofits, and other organizations).

[30] *See, e.g.*, Press Release, Making Home Affordable, *Making Home Affordable Program on Pace to Offer Help to Millions of Homeowners* (Aug. 4, 2009), *available at http://makinghomeaffordable.gov/pr_08042009.html*.

[31] *See* Ruth Simon & James R. Hagerty, *One in Four Borrowers Is Underwater*, Wall St. J., Nov. 24, 2009, at A1, *available at http://online.wsj.com/article/SB125903489722661849.html*.

[32] *See, e.g.*, Brady Dennis & Renae Merle, *Democrats Push More Mortgage Aid*, Wash. Post, Dec. 8, 2009, at A19, *available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/07/AR2009120703903.html* (noting that "6 percent of borrowers enrolled in the [MHA] program so far have moved from trial modification to permanent adjustment"); Renae Merle, *Banks Slow to Modify Mortgages*, Wash. Post, Aug. 5, 2009, *available at http://www.washingtonpost.com/wp-dyn/content/article/2009/08/04/AR2009080401134.h*

are eligible for government and private assistance programs, many housing counselors and servicers have struggled to respond in a timely manner to the sheer number of consumers who are seeking loan modifications,[33] leaving consumers who are desperate to save their homes waiting anxiously for assistance.

Many consumers who have been unable to obtain assistance have turned to MARS providers. These for-profit companies have widely promoted their ability to help consumers in negotiating with lenders or servicers and in taking other steps to prevent foreclosure.[34] Responding to consumer demand, these providers focus their advertising mainly on their capacity to obtain mortgage loan modifications[35] as opposed to other forms of foreclosure relief, such as a short sale or loan forbearance.[36] Mortgage

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tml ("Less than 10 percent of delinquent borrowers eligible for the Obama administration's foreclosure prevention program have received help so far, according to Treasury Department estimates. . . .").

[33] *See, e.g.*, NCLC at 2 (noting that servicers have failed to meet borrower demand for loan modifications); NAAG at 7 (noting that borrowers have had a difficult time reaching servicers and obtaining their assistance); Peter S. Goodman, *A Plan to Stem Foreclosures, Buried in a Paper Avalanche*, N.Y. Times, July 29, 2009, at A1, *available at http://www.nytimes.com/2009/06/29/business/29loanmod.html*.

[34] *See MARS ANPR*, 74 FR at 26134-35.

[35] Another foreclosure prevention method that MARS providers have used is "sale-leaseback" or "title reconveyance" transactions. In these transactions, MARS providers instruct financially distressed consumers to transfer title to their homes to the providers and then lease the property back from the providers. The providers promise to reconvey title to the homes at some later date, yet often do not do so, thereby giving the providers the equity in the homes. The incidence of such sale leaseback and title reconveyance transactions appears to have declined, in part because many consumers do not have significant equity in their homes.

[36] *See, e.g.*, NAAG at 2 ("[T]he [loan modification] consulting business model is dominating the marketplace. Consultants are by far the most common source of consumer complaints received by our offices in the area of mortgage assistance

assistance services based on negotiating with the lender or servicer to obtain a loan modification or some other type of foreclosure relief have mushroomed in the past two years.[37] Given that there are many small and relatively new MARS providers, it is difficult to estimate the total number of such providers,[38] but comments suggest that there are at least 450.[39]

Typically, MARS providers charge consumers advance fees in the thousands of dollars.[40] Some providers collect their entire fee at the beginning of the transaction,[41] and

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services."); OH AG at 2 ("For those companies that actually do put some effort into helping the consumer, the most common business model is an offer to negotiate a loan modification or repayment plan with the consumer's servicer."); CRC at 1 ("In California, advertisements promising loan modification success are inescapable."); *see also* Appendix B.

[37] *See id.*

[38] *See, e.g.*, NAAG at 3 ("It is difficult to gather exact empirical data on companies providing loan modification and foreclosure rescue services due to the predominance of internet-based companies and their ephemeral nature. The difficulty of gathering information is increased due to the fact many of these companies operate primarily over the internet and do not maintain a physical presence in the states in which they do business."); OH AG at 2 ("There is little reliable data about the foreclosure rescue industry.").

[39] *See, e.g.*, NAAG at 4 (noting that state attorneys general have investigated more than 450 mortgage assistance relief services).

[40] *Id.*; *see also, e.g.*, CRC at 3 ("The average fee that we are seeing borrowers charged is $3,000; we have seen fees as high as $9,500."); NCRC at 3 ("NCRC documented a median fee of $2,900 . . . for our testing study. Fees ranged as high as $5,600 . . . ."); NCLR at 1 (observing fees as high as $8,000); NCLC at 6 (estimating fees to be between $2,000 and $4,000).

[41] *See, e.g.*, *FTC v. Infinity Group Servs.*, No. SACV09-00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009); *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. June 1, 2009); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

others request two to three large installment payments from consumers.[42] One commenter stated that many MARS providers have begun to offer their services piecemeal, collecting fees upon reaching various stages in the process, such as assembling the documentation required by the lender or servicer, mailing paperwork to the lender or servicer, and negotiating with a lender's loss mitigation department.[43]

As discussed in the ANPR, MARS providers often claim to possess specialized knowledge of the mortgage lending industry,[44] sometimes hiring former mortgage brokers and real estate agents[45] to support their claims. In addition, a growing number of MARS providers are employing or affiliating with lawyers.[46] The providers often tout

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[42] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009); *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009); *FTC v. First Universal Lending, LLC*, No. 09-CV-82322, Mem. TRO at 5 (S.D. Fla. filed Nov. 24, 2009).

[43] *See, e.g.*, NAAG at 5; *see also, e.g.*, *FTC v. Debt Advocacy Ctr., LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009).

[44] *See, e.g.*, *FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 15, 2009); *FTC v. LucasLawCenter "Inc.,"* No. 09-CV-770 (C.D. Cal. filed July 7, 2009).

[45] *See, e.g.*, NCLC at 11 ("Mortgage brokers–often cited as one of the driving forces in the growth of bad subprime loans–are in demand to work for loan modification companies. One MARS advertised for consultants with mortgage and real estate experience to join its cadre of loan modification specialists.").

[46] *See, e.g.*, *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX), Mem. Supp. Pls. Ex Parte App. at 3 (Aug. 3, 2009) (alleging that defendants engaged in "misrepresentations prohibited by the TRO, behind a new facade: the 'Walker Law Group,'" which was "nothing more than a sham legal operation designed to evade state law restrictions on the collection of up-front fees for loan modification and foreclosure relief"); *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC v. Data Med. Capital Inc.*, No. SA-CV-99-1266 AHS (Eex) (C.D. Cal., contempt application filed May 27, 2009); *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009); *FTC v. Fed. Loan*

the expertise of these attorneys in negotiating with lenders and servicers. In some cases, MARS providers also offer "forensic audits," purported reviews of mortgage loans to determine lender and servicer compliance with federal and state law, thereby supposedly helping the consumer to acquire the leverage needed to obtain better loan modifications.[47] Providers also may use their relationship with attorneys to assert that they are not covered by state laws that prohibit non-attorneys from collecting advance fees for loan modification services.[48] For example, a previous California law that imposed a number of restrictions on "foreclosure consultants" also allowed "licensed attorneys . . . [to]

Modification Law Ctr., LLP, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *see also, e.g.*, *Cincinnati Bar Assoc. v. Mullaney,* 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services); Press Release, North Carolina Dep't of Justice, *AG Cooper Targets California Schemes that Prey on NC Homeowners* (July 15, 2009), *available at http://www.ncdoj.com/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/AG-Cooper-targets-California-schemes-that-prey-on-.aspx*; Press Release, Colorado Attorney General's Office, *Attorney General Announces Actions Against Seven Loan-Moficiation Companies As Part of Multistate Sweep* (July 15, 2009), *available at http://www.coloradoattorneygeneral.gov/press/news/2009/07/15/attorney_general_announces_actions_against_seven_loan_modification_companies_p*; Press Release, Illinois Attorney General, *Illinois Attorney General Sues 14th Company for Mortgage Rescue Fraud* (Aug. 28, 2009), *available at http://www.illinoisattorneygeneral.gov/pressroom/2008_08/20080828.html*.

[47] *See, e.g.*, *FTC v. Data Med. Capital Inc.*, No. SA-CV-99-1266 AHS (Eex), Mem. Supp. App. Contempt at 18 (C.D. Cal. filed May 27, 2009); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); California Dep't of Real Estate, *Consumer Alert* 6 (warning consumers of "forensic loan reviews"), *available at http://www.dre.ca.gov/pdf_docs/FraudWarningsCaDRE03_2009.pdf*.

[48] *See supra* notes 46-47; *see also* IL AG at 2 ("Attorneys are using the [state] exemption to market and sell the same mortgage consulting services provided by non-attorneys.").

charge advance fees under certain limited circumstances."[49] The State Bar of California subsequently observed that "foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations."[50] California has since passed a new law that removes this exemption.[51]

B. Observed Consumer Protection Abuses

The FTC has extensive law enforcement experience with MARS providers. In the past two years, the Commission has filed 28 law enforcement actions against providers of loan modification and foreclosure rescue services.[52] This extensive law

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[49] Press Release, Office of the Attorney General, California Dep't of Justice, *Brown Alerts Homeowners that New Law Prohibits Up-front Fees for Foreclosure Relief Services* (Oct. 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1821*.

[50] *See* State Bar of California, *Ethics Alert: Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications* 2, ETHICS HOTLINER (Feb. 2, 2009), *available at http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf* ("California State Bar Ethics Alert"); *see also* Florida Bar, *Ethics Alert: Providing Legal Services to Distressed Homeowners* at 1, *available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf?OpenElement* ("The Florida Bar's Ethics Hotline recently has received numerous calls from lawyers who have been contacted by non-lawyers seeking to set up an arrangement in which the lawyers are involved in loan modifications, short sales, and other foreclosure-related rescue services on behalf of distressed homeowners. . . . The [Florida] Foreclosure Rescue Act . . . imposed restrictions on non-lawyer loan modifiers to protect distressed homeowners. The new statute appears to be the impetus for these inquiries.").

[51] CAL CIV. CODE § 2944.7; *see also* Press Release, Office of the Attorney General, California Dep't of Justice, *Brown Alerts Homeowners that New Law Prohibits Up-front Fees for Foreclosure Relief Services* (Oct. 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1821*.

[52] *See* Appendix B.

enforcement experience, as well as the information received in response to the ANPR,[53] strongly suggests that the deceptive practices of MARS providers are widespread and are causing substantial harm to consumers. MARS providers often misrepresent the services that they will perform and the results they will obtain for consumers. Indeed, providers frequently fail to perform even the most basic of promised services. As a result, consumers not only lose the thousands of dollars they pay to the providers, but may also lose their homes.

Typically, MARS providers initiate contact with prospective customers through Internet, radio, television, or direct mail advertising. The ads instruct consumers to call a toll-free telephone number or e-mail the company. Customary claims in the ads and ensuing telemarketing and email pitches include representations that the MARS provider: (1) will obtain for the consumer a substantial reduction in a mortgage loan's interest rate, principal amount, or monthly payments; (2) will achieve these results within weeks;[54] (3) has special relationships with lenders and servicers;[55] and (4) is closely affiliated with the

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[53] As stated above, the Commission received few comments from MARS providers in response to its ANPR. Therefore, to ensure that it has complete and accurate information concerning mortgage assistance service providers, the effect of their activities on consumers, and the impact of proposed restrictions in their operations, the Commission is especially interested in receiving comments from MARS providers in response to this NPRM.

[54] *See, e.g.*, *FTC v. First Universal Lending, LLC*, No. 09-CV-82322, Mem. TRO at 4-5 (S.D. Fla. filed Nov. 24, 2009); *FTC v. 1st Guar. Mortgage Corp.*, No. 09-DV-61846 (S.D. Fla. filed Nov. 17, 2009); *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. filed June 1, 2009); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

[55] *See, e.g.*, *FTC v. Debt Advocacy Ctr., LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009); *FTC v. 1st Guar. Mortgage Corp.*, No. 09-DV-61846 (S.D. Fla filed

government,[56] various nonprofit programs,[57] or the consumer's own lender or servicer.[58] In some cases, MARS providers also entice consumers to make substantial up-front payments with false promises of a refund if they do not receive the promised results.[59]

Nov. 17, 2009); *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC v. US Foreclosure Relief Corp.*, No. SACVF09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[56] *See, e.g.*, *FTC v. Washington Data Res., Inc.*, No. 8:08-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009) (alleging that defendants falsely represented that they were affiliated with the United States government); *FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 15, 2009); *FTC v. Sean Cantkier,* No. 1:09-cv-00894 (D.D.C. filed July 10, 2009) (alleging defendants placed advertisements on Internet search engines that refer consumers to websites that deceptively appear to be affiliated with government loan modification programs); *FTC v. Thomas Ryan*, No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (charging defendant with misrepresenting that it is part of or affiliated with the federal government); *see also* OH AG at 4 ("Our office has seen many companies that have names or advertisement that make it sound like they are government sponsored."); NCLC at 3 ("One website, USHUD.com, even claims to be 'America's Only Free Foreclosure Resource' even though HUD-certified agencies also offer free assistance regardless of income.").

[57] *See FTC v. New Hope Prop. LLC*, No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009).

[58] *See, e.g.*, *FTC v. Kirkland Young, LLC*, No. 09-23507 (S.D. Fla. filed Nov. 18, 2009) (alleging that defendants falsely represented an affiliation with borrowers' lenders); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV-09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009); *see also* ABA at 7 ("They often misuse the intellectual property of lenders and servicers by claiming in mailings, on websites, and in other communications that they either are affiliated with the lenders and servicers or have special relationships with them that do not exist. They use the names, trademarks and logos of these lenders and servicers in their advertising to deceive consumers into believing they can obtain modification relief for them that these consumers could not otherwise obtain for themselves at no cost."); Chase at 3 ("These MARS entities also may lead the borrower to believe that they are associated with the servicer or that they have special agreements with the servicer for processing loan modifications, when, in fact, they do not.").

[59] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendant falsely claims to provide "100% money

Providers typically also represent that there is high likelihood, and in some instances a "guarantee," of success.[60] Despite these promises of extremely high success rates, the vast majority of consumers do not receive the promised results.[61]

Even if the services of MARS providers could deliver the promised results, many providers do not provide even the most basic services they claimed they would perform. After collecting their up-front fees, MARS providers often fail to make initial contact with the lender or servicer for months, if at all. They frequently neglect to commence

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back guarantee"); *Debt Advocacy Ctr., LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009) (alleging that defendants falsely represent they would refund borrower fee if unsuccessful); *FTC v. Infinity Group Servs.*, No. SACV09-00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009); *FTC v. Loan Modification Shop, Inc.*, No. 3:09-cv-00798 (JAP), Mem. Supp. TRO at 1 (D.N.J. amended complaint filed Aug. 4, 2009) (alleging defendants represented that advance fees were fully refundable); *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. June 1, 2009) (alleging defendants promised "100% money-back guarantee" but then failed to provide refunds).

[60] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009) (alleging defendants falsely claimed success rate of 97 to 100%); *FTC v. Debt Advocacy Ctr., LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009) (alleging defendants falsely claimed a 90% success rate); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging "[d]efendants have told homeowners that their success rate is above ninety percent"); *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX) (C.D. Cal. filed July 7, 2009) (alleging "[d]efendants' representatives tell consumers that Defendants have a success rate in the ninetieth percentile with their lender"); *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. filed June 1, 2009) (alleging defendants claimed to have 97% success rate); *FTC v. Data Med. Capital Inc.*, No. SA-CV-99-1266 AHS (Eex), Mem. Supp. App. Contempt at 8 (C.D. Cal. filed May 27, 2009) (alleging defendants represented 100% success rate to consumers).

[61] *See, e.g.*, *infra* note 123-27; CMC at 1 ("CMC members and other mortgage servicers found that MARS providers consistently misrepresent their ability to obtain concessions from servicers . . . ."); Chase at 3 ("They collect their fees up-front and promise the borrower they can get a loan modification or other foreclosure relief, when, in fact, this is only a determination that the servicer can make after reviewing the borrower's financial information and investor agreements.").

negotiations or have substantive discussions with the consumer's lender or servicer.[62] In many cases, the consumer harm from this failure to perform as promised is exacerbated because MARS providers often instruct consumers to stop communicating with their lenders.[63] Because consumers sever their contact with lenders and servicers, they may not discover that their MARS provider is doing little or nothing on their behalf; may never learn of concessions that their lender or servicer is willing to make; or, worst of all, may never discover that foreclosure is imminent.[64] In some cases, MARS providers

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[62] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendant often failed to return borrowers' phone calls and failed to contact and negotiate with lenders); *FTC v. Apply2Save, Inc.*, No. 2:09-cv-00345-EJL-CWD (D. Idaho filed July 14, 2009) (complaint alleging that "[m]any consumers learned from their lenders that Defendants had not even contacted the lender or that Defendants had only minimal, non-substantive contact with the lender"); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that "Defendants have misrepresented that negotiations were underway, although Defendants had not yet contacted the lender"); *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX), Mem. Supp. App. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that consumers who contact their lenders "learn that [Defendant] never even contacted the lender, or merely verified the consumer's loan information'); *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. June 1, 2009) (alleging that defendants failed to act on homeowners' cases for longer than four to six weeks without completing – or in some cases, even starting – negotiations and "failed to return consumers' repeated telephone calls, even when homeowners were on the brink of foreclosure").

[63] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009); *FTC v. Kirkland Young, LLC*, No. 09-23507 (S.D. Fla filed Nov. 18, 2009); *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009); *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[64] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009) ("When consumers speak with their lenders directly, they often discover that Defendants had not yet contacted the lender or only had left messages or had non-substantive contacts with the lender."); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX), Mem. In Supp. of Ex Parte TRO at 18-19 (C.D. Cal. filed

advise consumers to discontinue making their mortgage payments, without informing them that doing so can result in the loss of their homes and damage to their credit ratings.[65] Because of this advice, consumers who otherwise could have avoided becoming delinquent may damage their credit rating or end up in foreclosure.

In addition, some MARS providers make the specific claim that they offer legal services,[66] when, in fact, no attorneys are employed at the company or, even if there are, they do little or no legal work for consumers.[67] The Commission's law enforcement

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July 13, 2009) (detailing "devastating effects" of consumers learning too late of lack of effort by loan modification company); CRC at 7 ("People who do have a chance of keeping the home are being steered away from legitimate, free homeowner counseling services or are failing to take any action before it is too late because they have been assured everything is being taken care of for them already. All too often, it is not.").

[65] *See, e.g.*, *FTC v. First Universal Lending, LLC*, No. 09-CV-82322 (S.D. Fla. filed Nov. 24, 2009); *FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 15, 2009); *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX) (C.D. Cal. filed July 9, 2009) ("In numerous instances, Defendants' representative [allegedly] encourages consumers to stop paying their mortgages, telling consumers that delinquency will demonstrate the consumers' hardship to the lender and make it easier to obtain a loan modification."); *see also* NAAG at 10 ("In some cases, the mortgage consultants will actually counsel the consumer not to make a mortgage payment, which of course frees up funds for the consultants' fee.").

[66] *See, e.g.*, *FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 16, 2009) (alleging that defendants falsely claim to have attorneys or forensic accountants on staff); *FTC v. Loan Modification Shop, Inc.*, No. 3:09-cv-00798 (JAP), Mem. Supp. TRO at 14 (D.N.J. filed Aug. 4, 2009) (alleging that defendants misrepresent "that it is an attorney-based company"); *see also FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX), Mem. Supp. App. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[d]espite promises to the contrary, consumers have no contact with the purported attorneys who are supposed to be negotiating with their lenders").

[67] *See, e.g.*, *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009); *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009); *see also, e.g.*, *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX), Prelim. Rep. Temp. Receiver at 2-3 (C.D. Cal. filed July 7, 2009) (stating that defendants' "relationship with two different lawyers was nominal at

experience, state law enforcement, the comments received in response to the ANPR, and state bar actions indicate that a growing number of attorneys themselves are engaged in deceptive and unfair practices in the marketing and sale of MARS.[68]

C. Continued Law Enforcement and Other Responses

The Commission has taken aggressive action to protect consumers from deceptive MARS providers. As part of that effort, the FTC has filed 28 lawsuits[69] in the last two years against entities in this industry for engaging in deceptive practices in violation of the FTC Act and, in several instances, the Commission's Telemarketing Sales Rule (TSR).[70] The FTC has coordinated with state law enforcement and federal agencies,

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best and served primarily as a cover to dignify the business and invoke the attorney exception to advance fee prohibitions").

[68] *See, e.g.*, IL AG at 1 (noting that "33 percent of the [MARS] companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession"); CRC at 2 ("An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services. . . ."); MN AG at 5 ("This Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law."); NAAG at 4 ("Attorneys . . . have an increasing presence in this industry and have been found working in conjunction with or serving as referral sources for mortgage consultants."); *see also, e.g.*, Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud, 111th Cong. 1st Sess., Testimony of Scott J. Drexel (State Bar of California) at 2, 4 (Drexel Testimony) (noting that attorney misconduct in connection with MARS "is a problem of extremely significant – if not crisis – proportions in California," and that the state bar has initiated over 175 associated investigations of attorneys); Polyana Da Costa, *Record Number of Complaints Target Florida Loan Modification Lawyers*, Law.com (Oct. 1, 2009) ("The [Florida] state attorney general has received a record 756 complaints through August of this year about loan modifications involving attorneys."), *available at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434223147*.

[69] *See* Appendix B.

[70] 16 CFR 310.1, *et seq*. (2003); s*ee, e.g.*, *FTC v. Kirkland Young, LLC*, No. 09-23507 (S.D. Fla. filed Nov. 18, 2009); *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-

including the Department of Justice, the Department of Housing and Urban Development (HUD), the Treasury Department, and the Office of the Special Inspector General for the Troubled Asset Relief Program (SIG-TARP), in these efforts.[71] For example, the FTC has conducted two nationwide sweeps: "Operation Stolen Hope" (November 24, 2009), in which the Commission joined with 20 states collectively to file over one hundred lawsuits against MARS providers,[72] and "Operation Loan Lies" (July 15, 2009), in which the FTC coordinated with 25 federal and state agencies to bring 189 actions against MARS defendants.[73] Previously, the Commission, jointly with the Justice Department, the Treasury Department, HUD, and the Illinois Attorney General's office, had announced several law enforcement actions.[74]

02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009); *FTC v. First Universal Lending, LLC*, No. 09-CV-82322 (S.D. Fla. filed Nov. 24, 2009); *FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 15, 2009); *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204-JBX-JS (D.N.J. filed Sept. 14, 2009); *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[71] *See* Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm*; Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm*.

[72] Press Release, FTC, *Federal and State Agencies Target Mortgage Relief Scams* (Nov. 24, 2009), *available at http://www.ftc.gov/opa/2009/11/stolenhope.shtm*.

[73] Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm*.

[74] Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm*. In connection with these joint efforts, the Commission also sent warning letters to 71 companies for marketing potentially deceptive mortgage loan modification and foreclosure assistance programs. *Id.*

In addition to coordination with the Commission, the states have continued to engage in their own aggressive law enforcement. For example, the National Association of Attorneys General (NAAG) reports that, as of July 2009, its members had investigated 450 MARS providers and sued hundreds of them for alleged state law violations.[75] The states also have continued to enact laws and regulations to address practices related to MARS.[76]

III. Discussion of the Proposed Rule

A. Section 322.1: Scope

As detailed in Section I, the scope of this rulemaking is set forth in the Omnibus Appropriations Act, as clarified by the Credit CARD Act. These statutes direct the Commission to commence a rulemaking proceeding to enact rules "related to unfair or deceptive acts or practices" that address, among other things, mortgage assistance relief services. As noted earlier, the Commission interprets this language to allow it to issue

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[75] NAAG at 4; *see also* IL AG at 1 (noting that Illinois has over 240 open investigations of MARS providers and filed 28 lawsuits against them).

[76] To date, at least 29 states and the District of Columbia have enacted such statutes or regulations. *See, e.g.*, CAL. CIV. CODE §§ 2944.7 & 2945, *et seq.*; COLO. REV. STAT. § 6-1-1101, *et seq.*; 2009 CONN. GEN. STAT. § 36a-489; 6 DEL. CODE ANN. § 2400B, *et seq.*; D.C. CODE § 42-2431, *et seq.*; FLA. STAT. § 501.1377; HAW. REV. STAT. § 480E-1, *et seq.*; IDAHO CODE ANN. § 45-1601, *et seq.*; 765 ILL. COMP. STAT. ANN. 940/1, *et seq.*; 24 IND. ADMIN. CODE § 5.5-1-1, *et seq.*; IOWA CODE § 741E.1, *et seq.*; ME. REV. STAT. ANN. tit. 32, §§ 6171, *et seq.* & 6191, *et seq.*; MD. CODE ANN., REAL PROPERTY § 7-301, *et seq.*; 940 MASS. CODE REGS. § 25.01, *et seq.*; MICH. COMP. LAW § 445.1822, *et seq.*; MINN. STAT. § 325N.01, *et seq.*; MO. REV. STAT. § 407.935, *et seq.*; NEB. REV. STAT. § 76-2701, *et seq.*; NEV. REV. STAT. § 645F.300, *et seq.*; N.H. REV. STAT. ANN. § 479-B:1, *et seq.*; N.Y. REAL PROP. LAW § 265-b; N.C. GEN. STAT. § 14-423, *et seq.*; 2008 OR. LAWS CH. 19; R.I. GEN. LAWS § 5-79-1, *et seq.*; TENN. CODE ANN. § 47-18-5501, *et seq.*; VA. CODE ANN. § 59.1-200.1; WASH. REV. CODE § 19.134.010, *et seq.*; WIS. STAT. § 846.45.

rules that not only restrict practices that are themselves unfair or deceptive, but also to restrict other practices that may not themselves be unfair or deceptive but the restriction of which is reasonably related to the goal of preventing unfairness or deception. The Commission's rulemaking authority is limited by the Credit CARD Act to persons over whom the FTC has enforcement power under the FTC Act.

B. Section 322.2: Definitions

1. Section 322.2(h): Mortgage Assistance Relief Service

As discussed, the proposed Rule is intended to regulate for-profit providers of mortgage assistance relief services. The controlling definition of the proposed Rule, which informs the parameters of its scope, is that of "mortgage assistance relief service." Proposed § 322.2(h) defines "mortgage assistance relief service" to include "any service, plan or program, offered or provided in exchange for consideration on behalf of the consumer, that is represented, expressly or by implication, to assist or attempt to assist the consumer" negotiate a modification of any term of a loan or obtain other types of relief to avoid delinquency or foreclosure. Proposed § 322.2(h)(2) provides that the term "mortgage assistance relief services" includes any service marketed to "stop[], prevent[], or postpone[] any (i) mortgage or deed of trust foreclosure sale for a dwelling or (ii) repossession of the consumers' dwelling; or otherwise save the consumer's home from foreclosure or repossession." Proposed §§ 322.2(h)(3)-(7) further define these services to include offers purported to assist consumers in obtaining: (1) a forbearance or repayment plan; (2) an extension of time to cure default, reinstate a loan, or redeem a property;[77] (3)

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[77] In some states, mortgagors have the right to "redeem," *i.e.*, regain possession of, a property for a period of time following foreclosure.

a waiver of an acceleration clause or balloon payment; and (4) a short sale, deed-in-lieu of foreclosure, or any other disposition of the property except a sale to a third-party that is not the loan holder. Accordingly, proposed § 322.2(h) is intended to apply to every solution that may be marketed by covered providers to financially distressed consumers as a means to avoid foreclosure or save their homes.

One example of this coverage is the marketing of sale-leaseback or title-reconveyance transactions, which commonly are touted to consumers as a means to avert foreclosure or its consequences.[78] As a general matter, the FTC does not intend the proposed Rule to address how title-transfer transactions are regulated. The Commission recognizes that there are many comprehensive state laws that govern these types of transactions and impose specific requirements when title transfers occur.[79] To the extent sale-leaseback and title-reconveyance transactions are marketed as a means to avoid foreclosure, however, these purported services would be covered by the proposed Rule. The Commission specifically solicits comment on how the proposed Rule should apply to these types of transactions, especially in light of existing state laws.

As a general matter, mortgage brokers are covered by the proposed Rule to the extent that they market "mortgage assistance relief services."[80] The Commission does

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[78] *See supra* note 35; *see also* NAAG at 2.

[79] *See supra* note 76. For example, some laws mandate that before doing a title transfer the foreclosure rescue operator must verify that the consumer can reasonably afford to repurchase the home. *See, e.g.*, MINN. STAT. § 325N.17(a)(1).

[80] *See* NAAG at 11-12 ("We have already seen complaints in which mortgage brokers charge consumers for mortgage consulting services and then failed to provide services or provided fewer services that originally promised. The trend of mortgage brokers providing services is likely to continue, especially if the market for mortgage

not intend the proposed Rule to apply to bona fide loan origination or refinancing services that mortgage brokers frequently offer. To obtain a new loan or refinance an existing loan, consumers can work either with the lender directly or with a mortgage broker who acts as an intermediary between the consumer and lender. Mortgage brokers can provide the benefit of offering consumers a wider choice of loan products from different lenders, without consumers having to deal with each lender separately.[81] Homeowners who are delinquent on their loans may be among the consumers whom mortgage brokers assist by helping them refinance their loans.

The Commission is mindful that consumers at risk of foreclosure could benefit from assistance in refinancing, and does not wish the proposed Rule to reduce the availability of legitimate services of this kind. At the same time, the Commission is concerned that services purported to help consumers obtain refinancing could be marketed deceptively as a means to avoid foreclosure.[82] Mortgage brokers or others could deceive consumers into paying large, up-front fees for loan origination or

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loan origination remains soft.").

[81] Mortgage brokers typically are paid by the lender, and sometimes the borrower, from the closing costs of the loan transaction. *See, e.g.*, National Association of Mortgage Brokers FAQs, *available at http://www.namb.org/namb/FAQs1.asp?SnID=498395277*; *see also* NAAG at 12 (noting that brokers "are traditionally paid . . . at the closing of a consumer's loan, after all services have been provided"); NCLC at 29 ("[B]rokers are normally paid only when a sale or mortgage transaction is completed.").

[82] Consumers who otherwise would not consider themselves eligible to refinance their mortgage might have a different perspective because publicized government programs such as the MHA program offer consumers the opportunity to refinance at lower interest rates, even though they are delinquent or owe more than what the home is worth.

refinancing services based on false promises that consumers will be able to save their homes. Thus, the Commission solicits comment on how the proposed Rule should treat offers from mortgage brokers to work with lenders to negotiate new loans or refinance existing loans.

Finally, mortgage assistance relief services are limited to services that are marketed to consumers[83] who owe on loans secured by a "dwelling" or residence. A "dwelling" is defined to be a residential structure containing four or fewer units, whether or not it is attached to real property. The term dwelling also includes individual condominium units, cooperative units, mobile homes, or trailers.[84] On the other hand, the

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[83] "Consumer" is broadly defined to include "any natural person who owes on any loan secured by a dwelling." Proposed § 322.2(b). The Commission intends to cover consumers at every stage of the process, and does not limit the proposed Rule to those who are in default or foreclosure. Commenters observed that many consumers seek assistance from MARS providers before they are delinquent on their loans. *See* CMC at 8 ("Many of the abuses that servicers have encountered have occurred before the consumer has received a notice of default. MARS providers sometimes solicit customers who are not in default but who live in areas with high numbers of distressed borrowers. Any rule should apply to MARS providers at any stage of the process."); CFA at 4 ("Many homeowners have sought help from MARS before entering default, though sometimes the MARS then encourages a default. . . . The mortgage servicing industry and others have urged homeowners to seek help before they go into default."); NCRC at 2 (noting that there are "[c]ompanies claiming to offer assistance with loan modifications, to consumers who may or may not be in default"); *see also* NAAG at 11 ("The [state] requirement that consumers be in default before statutory protections begin made sense when mortgage consultants solicited business based on foreclosure filings, as those consumers would necessarily be in default. Mortgage consultants are now able to mine public information to target consumers who are not yet in default. Consultants may rely on an internet presence to draw in consumers who may also not be in default. As consumers have grown more concerned about the state of the economy, these solicitations are proving increasingly attractive. Based on these reasons, a rule should provide as much coverage for consumers as possible.").

[84] Proposed § 322.2(d). The definition for dwelling is based on that used in Regulation Z, 12 CFR 226, which implements the Truth in Lending Act, 15 USC 1601 *et seq*. 12 CFR 226.2(a)(19) (2009).

proposed Rule is not intended to cover MARS offered to borrowers whose loans are secured by commercial properties. The definition of "dwelling" applies only to residences that are "primarily for personal, family, or household purposes."[85] Based on its law enforcement experience, the Commission believes that there are consumers who may own a second home or a rental property and seek help to avoid foreclosure on these properties. Therefore, the Commission intends the proposed Rule to apply to mortgage assistance relief services marketed to these consumers.

2. Section 322.2(c): "Clear and Prominent"

The proposed Rule mandates that disclosures be made with clarity and prominence in various types of media. As discussed in more detail in Section III.D, the proposed disclosures are intended to prevent deception and allow consumers to make purchasing decisions about mortgage assistance relief services based on truthful information. The proposed Rule sets forth general requirements to ensure that the disclosures made in commercial communications[86] are sufficiently clear and prominent for consumers to notice and comprehend them.[87] In all cases, disclosures are required to

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[85] This language is derived from Regulation Z. *See* 12 CFR at 226.2(a)(12) (definition of "consumer credit").

[86] As defined in the proposed Rule, "commercial communication" is intended to include any written or verbal statement, illustration, or other depiction used to induce the purchase of goods or services. *See* Proposed § 322.2(a).

[87] Where possible, in formulating the requirements of the proposed Rule, the Commission has drawn from comparable FTC rules requiring clear and prominent disclosures. *See* Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.6 (2007) (Franchise Rule); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 CFR 437.1 (2007) (Business Opportunity Rule); Regulations Under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (1994) (Fair Packaging and Labeling Act Regulations); Trade Regulation Pursuant to the

use syntax and wording that consumers easily can understand, and cannot be accompanied with statements that contradict or confuse their meaning.[88] The proposed Rule intends to prevent MARS providers from undermining required disclosures with contradictory or obscuring information. In addition, as described below, there are clear and prominent requirements that are specific to the particular media in which disclosures appear. In the Commission's view, the extensive record of deception in the MARS industry makes it necessary to articulate with specificity how MARS providers must make required disclosures to consumers.

a. Written Disclosures

Proposed § 322.2(c)(1) sets forth various requirements for disclosures disseminated in print or written form. This includes consumer communications that appear in print publications or on a computer screen. For such disclosures, the proposed Rule specifies that the disclosure must be in a color that readily contrasts with the background of the consumer communication,[89] be in the same language predominant in

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Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.2 (1993) (900 Rule); Rule Concerning Cooling-Off Period for Sales Made at Home or at Certain Other Locations, 16 CFR 429.1 (1988) (Door-to-Door Sales Rule). The disclosure requirements also are consistent with those in many FTC orders. *See, e.g.*, *Sears Holding Mgmt. Co.*, Docket No. C-4264, File No. 082-3099 (FTC Sept. 9, 2009), *available at http://www.ftc.gov/os/caselist/0823099/090604searsdo.pdf*.

[88] *See* 900 Rule, 16 CFR 308.3(a)(5); Franchise Rule, 16 CFR 436.9(a); Business Opportunity Rule, 16 CFR 437.1(a)(21) (prohibits making any oral, visual, or written representation that contradicts the information required to be disclosed by the Rule).

[89] *See, e.g.*, *Tender Corp.*, Docket No. C-4261, File No. 082-3188 (FTC July 17, 2009), *available at http://www.ftc.gov/os/caselist/0823188/090717tenderdo.pdf* (stating that disclosures must appear "in print that contrasts with the background against which it appears"); *Budget Rent-A-Car-System, Inc.*, Docket No. C-4212, File No. 062-3042 (FTC Jan. 4, 2008), *available at http://www.ftc.gov/os/caselist/0623042/080104do.pdf* (same);

the communication,[90] and appear parallel to the base of the communication.[91] Unless otherwise specified in the proposed Rule, the text size must be the larger of 12-point font or one-half the size of the largest letter or numeral of any company website or telephone number that is displayed in the consumer communication.[92] If there is no website or telephone number displayed in a communication touting mortgage assistance relief services, the disclosures must be in at least 12-point type. The text-size requirements of the proposed Rule are comparable to those of the FTC's Trade Regulation Rule Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 ("900 Number Rule"), except for the 12-point type default.[93]

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see also FTC, *Dot Com Disclosures: Information about Online Advertising* 12 (2000), *available at http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf* ("*Dot Com Disclosures*") ("A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the advertisement is likely to be missed.").

[90] *See, e.g.*, 900 Rule, 16 CFR 308.3(a)(1). If the ad has substantial material in more than one language, the proposed MARS Rule requires that the disclosure be delivered in each such language. Proposed § 322.2(c)(1).

[91] *See, e.g.*, *Swisher Int'l, Inc.*, Docket No. C-3964, File No. 002-3199 (FTC Aug. 25, 2000), *available at http://www.ftc.gov/os/2000/08/swisherdo.htm* (finding that warnings for cigars must appear "parallel . . . to the base of the . . . advertisement"); Fair Packaging and Labeling Act Regulations, 16 CFR 500.4(b) (requiring that identification for packaged goods must appear "in lines generally parallel to the base on which the packaging or commodity rests as it is designed to be displayed").

[92] There are additional and qualifying requirements for disclosures mandated in §§ 322.4(b) and (c) of the proposed Rule.

[93] *See* 900 Rule, 16 CFR 308.

b. Audio Disclosures

Proposed § 322.2(c)(2) addresses the use of disclosures in audio communications such as broadcast radio or streaming radio. The disclosure must be delivered in a slow and deliberate manner, at a reasonable volume, and at a slow enough pace to be heard and understood.[94]

c. Video Disclosures

Proposed § 322.2(c)(3) imposes requirements for consumer communications disseminated through video means. This includes video communications that appear on television or are streamed over the Internet. As a threshold matter, these communications must be delivered in accordance with the requirements for written and audio disclosures in proposed §§ 322.2(c)(1) and (2). In addition, the communication must include a simultaneous audio and visual disclosure,[95] the latter of which must be displayed for at

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[94] *See, e.g.*, *Sears Holding*, Docket No. C-4264 (stating that audio disclosures must be made "in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them"); *Darden Rests., Inc.*, Docket No. C-4189, File No. 062-3112 (FTC May 11, 2009), *available at http://www.ftc.gov/os/caselist/0623112/070510do0623112c4189.pdf* (same); *In re Kmart Corp.*, Docket No. C-4197, File No. 062-3112 (FTC Aug. 15, 2007), *available at http://www.ftc.gov/os/caselist/0623088/0623088do.pdf* (same); *In re Palm, Inc.*, Docket No. C-4044, File No. 002-3222 (FTC Apr. 19, 2002), *available at http://www.ftc.gov/os/caselist/0023332/index.shtm* (same); *Dot Com Disclosures* at 14 (explaining that audio disclosures should be "in a volume and cadence sufficient for a reasonable consumer to hear and comprehend it").

[95] Disclosures are more effective if they are made in both the visual and audio part of a consumer communication. *See generally* Maria Grubbs Hoy & J. Craig Andrews, *Adherence of Prime-Time Televised Advertising Disclosures to the "Clear and Conspicuous" Standard: 1990 Versus 2002*, 23 J. MKTG. PUB. POL. 170 (2004) (stating that "dual modality" disclosures – oral and visual together – are more effective at communicating information to consumers); *see also In re Kraft, Inc*., 114 F.T.C. 40 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992) (finding that a visual disclosure alone was unlikely to be effective as a corrective measure in light of "the distracting visual and

least the duration of the oral disclosure and comprise four percent of the vertical picture height of the screen.[96]

d. Interactive Media

Proposed § 322.2(c)(4) addresses how disclosures must be made in interactive media formats, such as software, the Internet, or mobile media. The disclosures must conform with the requirements for written, audio, and video disclosures set forth in other parts of the "clear and prominent" definition. In addition, the disclosure must appear on a separate landing page immediately prior to the consumer incurring a financial obligation, be visible to the consumer without the need to scroll down any page, and be at least twice the type size of any hyperlink to the company's website. Further, the landing page cannot contain any information other than the disclosure statement. These requirements are intended to ensure that consumers see the information conveyed in the disclosures mandated by the proposed Rule at the time they are deciding whether to purchase a mortgage relief assistance service.[97] Without the use of a separate landing page, the Commission is concerned that the disclosure could be presented in such a way that the consumer might not see it or would be distracted with competing messages. For

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audio elements and the brief appearance of a complex superscript in the middle of the commercial").

[96] *See* Federal Election Commission Rules: Contributions and Expenditure Limitations and Prohibitions, 11 CFR 110.11(c)(3)(iii)(B)-(C) (statement concerning funding source for political ads "must appear in letters equal to or greater than four (4) percent of the vertical picture height" and "be visible for a period of at least (4) four seconds").

[97] *See Dot Com Disclosures* at 11 (explaining that disclosures are more likely to be effective if they are provided when the consumer is considering the purchase).

example, consumers often close out pop-up screens without actually viewing them.[98] The Commission seeks comment on whether use of a separate landing page is an effective method of conveying the required disclosures to consumers or whether another means should be used.

e. Program-length media

Proposed § 322.2(c)(6) requires that disclosures in program-length television, radio, and Internet-based advertisements for mortgage assistance relief services be presented at the beginning, near the middle, and at the end of the advertisement.[99] Requiring that disclosures be delivered at different stages of the broadcast better ensures that consumers who tune in at various times will receive them.

3. Section 322.2(i): "Mortgage Assistance Relief Service Provider"

Under proposed § 322.2(i), any person who "provides, offers to provide, or arranges others to provide, any mortgage assistance relief service" is a "mortgage assistance relief provider" subject to the proposed Rule. Proposed §§ 322.2(i)(1) and (2),

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[98] *See, e.g.*, Tom Espiner, *Web Users Ignoring Security Certificate Warnings*, CNET.com (July 28, 2009), *available at http://news.cnet.com/8301-1009_3-10297264-83.html* ("In an online study conducted among 409 participants, the [Carnegie Mellon University] researchers found that the majority of respondents would ignore [pop-up] warnings about an expired Secure Sockets Layer (SSL) certificate.").

[99] Section 308.3(a)(6) of the 900 Rule has a nearly identical requirement. 16 CFR 308.3(a)(6).

however, generally exclude loan holders,[100] servicers,[101] and the agents of such holders and servicers, from the definition of a MARS provider. In the ANPR, the Commission stated that this rulemaking would address "the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure."[102] A number of the public comments expressed concern that servicers (who are bona fide intermediaries between the loan holder and the consumer) may offer loss mitigation services that fall within the scope of the proposed Rule.[103] For example, a servicer may notify a consumer of her eligibility for a mortgage loan modification under the MHA Program and assist her in submitting the necessary paperwork. In addition, lenders and servicers may outsource these functions to

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[100] The proposed Rule defines "dwelling loan holder" to mean "a person that holds a loan secured by a dwelling." Proposed § 322.2(f).

[101] "Servicer" is defined in proposed § 322.2(j) as "the person responsible for receiving any scheduled periodic payments from a consumer pursuant to the terms of any dwelling loan, including amounts for escrow accounts under Section 10 of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. 2609, and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract." This definition tracks that of the servicer definition in the Real Estate Settlement Procedures Act. *See* 12 U.S.C. 2605(i).

[102] *MARS ANPR*, 74 FR at 26131. Note that the Commission is currently engaged in the MAP Rulemaking, which will address servicing practices.

[103] *See, e.g.*, CMC at 5 ("Servicers are increasingly turning to third-party service-providers to assist them in processing loan modifications and in other loss-mitigation activities."); ABA at 4-6; AFSA at 3, 5; MBA at 4.

other parties, especially given the current large number of consumers needing assistance.[104]

Commenters asserted that loan owners and servicers should be exempt from the proposed Rule for several reasons. First, servicers tend not to be engaged in the types of deceptive and unfair conduct described in the ANPR and this document, and are not likely to engage in such activities in the future.[105] Second, servicers do not commonly charge significant up-front fees in exchange for working with consumers.[106] Third, application of the proposed Rule to servicers could restrict or interfere with lenders' and servicers' efforts to inform consumers of loss mitigation options and handle their requests for relief.[107] The Commission wishes to avoid discouraging foreclosure solutions that may be beneficial to consumers.[108] Thus, the proposed Rule generally exempts loan holders and servicers and their agents.[109] The Commission seeks comment

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104 *See, e.g.*, David Lawder, *Few US mortgage modifications made permanent*, Reuters, *available at http://www.reuters.com/article/idUSN1021463420091210* (Dec. 10, 2009) (referring to a company that "has been hired by some of the largest U.S. banks to assist in modification efforts").

105 *See, e.g.*, ABA at 6; AFSA at 3; HPC at 2; *see also* NAAG at 13 ("We are unaware of any banks, thrifts or federal credit unions engaged in for-profit loan modification or foreclosure rescue services, aside from negotiating loan modifications for consumers whose loans they are servicing."); OH AG at 5.

106 *See, e.g.*, ABA at 5; AFSA 3-4; CMC at 4-5; MBA at 4; HPC at 2.

107 *See, e.g.*, MBA at 4.

108 Further, application of the advance fee ban provision, discussed *infra* § III.E, to servicers could interfere with their primary business function, collecting and processing scheduled loan payments on behalf of lenders. *See* Proposed § 322.5.

109 Note that proposed § 322.2(i) does not exempt agents of loan holders and servicers if they "claim, demand, charge, collect, or receive any money or other valuable consideration from the borrower for the agent's benefit." The limiting language ensures

on the exemption, including whether servicers have engaged in covered conduct that warrants encompassing them within the proposed Rule.

Finally, § 322.2(e)(3) exempts nonprofit entities excluded from the FTC's jurisdiction under the FTC Act.[110] The Commission intends for this exemption to include bona fide nonprofit housing counselors presently offering mortgage assistance relief services.[111] The FTC, however, does have jurisdiction over purported nonprofits that, in reality, operate for the profit of their members,[112] and proposed § 322.2(e)(3) does not exempt these entities.

C. Section 322.3: Prohibited Representations

Proposed § 322.3 addresses deceptive or unfair representations that MARS providers commonly make in marketing their services.

1. Section 322:3(a): Prohibited Statements

Proposed § 322.3(a) prohibits MARS providers from instructing consumers to cease communicating with their lenders or servicers. As discussed above, if consumers

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that MARS providers do not evade the Rule by styling themselves as "agents" of the lender or servicer. Thus, the exemption only applies to functions an agent undertakes on behalf of the lender or servicer but not on its own behalf.

[110] Section 5(a)(2) of the FTC Act states: ''The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce.'' 15 U.S.C. 45(a)(2). Section 4 of the Act defines ''corporation'' to include: ''any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members*. . . .'' 15 U.S.C. 44 (emphasis added).

[111] These nonprofit services are described in more detail in Section II.C. of the ANPR. *MARS ANPR*, 74 FR 26135.

[112] *See, e.g.*, *AMA v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by equally divided Court*, 455 U.S. 676 (1982); *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451 (D. Md. 2004).

comply with this instruction and stop communicating with their lenders and servicers, consumers may not discover that their MARS provider is doing little or nothing on their behalf, may never learn of concessions their lender or servicer is willing to make, or, worst of all, may never be informed that foreclosure is imminent. The Commission is not aware of any benefits to consumers or competition from MARS providers directing consumers to stop communicating with their lenders or servicers. Consumers cannot reasonably avoid the injury from this practice because many of them do not know of the potentially adverse consequences that could occur from ceasing such communications. Nor are there any countervailing benefits to consumers or competition from this practice. Accordingly, the Commission believes that it is an unfair practice for MARS providers to convey such an instruction to consumers. In addition, prohibiting this practice is reasonably related to the goal of preventing MARS providers from deceiving consumers by hiding from them the actions they have or have not taken on consumers' behalf.

2. Section 322.3(b): Prohibited Misrepresentations

Proposed § 322.3(b) prohibits misrepresentations of any material aspect of any mortgage assistance relief service. Proposed §§ 322.3(b)(1)-(8) sets forth a non-exclusive list of specific aspects of a mortgage assistance relief service about which misrepresentations would violate the proposed Rule. These aspects include the likelihood and time to provide services or obtain results; the affiliation of the provider with public or private entities; payment and other obligations under existing mortgage loans; the MARS provider's refund and cancellation policies; and the completion of promised services. This list tracks the types of false or misleading claims that the

Commission and the states have challenged in law enforcement actions, as described above.

A claim is "deceptive" under Section 5 of the FTC Act if there is "a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material."[113] Misrepresentations of material fact are deceptive practices under Section 5. The aspects of MARS specified in §§ 323.3(b)(1)-(7) of the proposed Rule are material to consumers because they pertain to the cost, central characteristics, efficacy or other attributes of such services that are important to consumers.[114] Thus, the misrepresentations proposed § 323.3(b) prohibits constitute deceptive practices under the FTC Act.

D. Section 322.4: Required Disclosures

Section 322.4 of the proposed Rule requires that MARS providers disclose information to consumers to assist them in making decisions about mortgage assistance relief services. First, proposed § 322.4(a) requires MARS providers to disclose clearly and prominently[115] in all of their commercial communications with consumers that they are for-profit businesses not associated with the government, and that neither the government nor the lender has approved the MARS provider's offer of services. The

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[113] *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-66, 175-76 (1984). Information is "material" if it is "likely to affect a consumer's choice of or conduct regarding a product." *Id.* at 165.

[114] *Id.* at 182-83.

[115] The disclosure must be made in a manner that conforms with the definition of "clear and prominent" in proposed § 322.2(c). *See supra* § III.B.2.

Commission intends for this disclosure to apply to all advertisements and other marketing materials directed at a general audience.

In addition, proposed § 322.4(b) requires that MARS providers disclose in all commercial communications directed to specific consumers, clearly and prominently and prior to consummating any agreement with the consumer, that: (1) the provider is a for-profit business not associated with the government, and neither the government nor the consumer's lender endorses its service; (2) the total amount consumers will have to pay to purchase, receive, and use the service; and (3) even if consumers buy the provider's service, there is no guarantee that their lender will agree to change their loan terms. The Commission intends these three disclosures to be made in every promotional communication between the MARS provider and a specific consumer that occurs prior to such consumer incurring any financial obligations.[116] The Commission believes it is appropriate to require the disclaimer disavowing any affiliation with the government or the consumer's lender not only in general advertising, but in ensuing promotional communications with consumers as well. Otherwise, MARS providers could qualify or contradict this disclaimer during subsequent telemarketing calls or other communications with individual consumers, which the FTC's enforcement experience indicates is common practice.[117]

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[116] As discussed in Section II.B, often MARS providers disseminate advertisements that instruct consumers to call a telephone number or contact an email address, and once consumers do so MARS providers begin to interact with them on an individual level.

[117] *See, e.g.*, *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (false success rate claims and other deceptive claims often made during telemarketing calls with consumers); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (same).

First, as described above, there are many government, nonprofit, and for-profit programs operating in the marketplace that provide a wide array of mortgage assistance relief services. In addition, the Commission and state law enforcement officials have brought numerous law enforcement actions against MARS providers who have misrepresented their affiliation with a government agency, a lender, a servicer, or others in connection with offering mortgage assistance relief services. These providers have used a variety of techniques to create such misimpressions, including adopting trade names that resemble the names of legitimate government programs.[118] Given the variety of entities that provide such services and the prevalence of these deceptive claims, the Commission believes that the requirement that MARS providers disclose their for-profit status and nonaffiliation with government or other programs is reasonably related to the goal of preventing deception.

Second, the total cost of the mortgage assistance relief services is perhaps the most material information for consumers in making well-informed decisions whether to purchase those services. Requiring the clear and prominent disclosure of total cost information in every communication directed at a specific consumer prior to the consumer entering into an agreement makes it less likely that MARS providers will deceive prospective customers with incomplete, inaccurate, or confusing cost information.[119] The Commission therefore believes that requiring MARS providers to

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[118] *See supra* note 56.

[119] An incidental benefit of requiring that MARS providers disclose total cost clearly and prominently is that such transparency may facilitate the efforts of consumers to comparison shop among MARS providers based on cost, which would be beneficial to consumers and competition.

disclose total cost information clearly and prominently is reasonably related to the prevention of deception.

Third, in light of the history of deceptive success claims in this industry and the many widely-publicized government programs to help consumers seeking relief from lenders, consumers are likely to overestimate their abilities to obtain substantial loan modifications or other mortgage relief from MARS providers, even in the absence of specific misrepresentations of success. Therefore, the Commission believes that requiring MARS providers to disclose clearly and prominently in all commercial communications with prospective customers that their lenders may not agree to change their loan even if consumers purchase the services the MARS provider offers is reasonably related to preventing deception.

The Commission has not conducted any empirical research into whether the disclosures that are specified in the proposed Rule would be an effective means of conveying information about the status, cost, and limitations of MARS. The Commission intends to study the effectiveness of any proposed disclosures in preventing consumer deception. To aid its analysis, the Commission seeks comment and data bearing on the costs and benefits of the disclosure requirements articulated in the proposed Rule.

E. Section 322.5: Prohibition on Collection of Advance Fees

The Commission proposes to ban MARS providers from requiring that consumers pay in advance for their services, *i.e.*, prior to the provider doing or accomplishing what it promised. This remedy is justified on two independent grounds: (1) that the collection of advance fees by MARS providers is an unfair act or practice and (2) that the

prohibition is reasonably related to the goal of preventing deception. It is also strongly supported by the public comments submitted by law enforcers, consumer groups, and financial service businesses.[120]

1. Advance Payments as an Unfair Act or Practice

Under Section 5(n) of the FTC Act, an act or practice is unfair if: (1) it causes or is likely to cause substantial injury to consumers; (2) that injury is not outweighed by countervailing benefits to consumers or competition; and (3) the injury is not reasonably avoidable by consumers themselves.[121] Section 5(n) also provides that the Commission may consider established public policies in determining whether an act or practice causes substantial injury, but may not use such policies as a primary basis for determining that an act or practice is unfair. The Commission believes that requiring that consumers pay advance fees for mortgage assistance relief services meets the standard for an unfair practice under Section 5(n) of the FTC Act, a conclusion that is supported by established public policies already incorporated into federal and state laws.

a. Substantial Injury to Consumers

The comments received and the Commission's law enforcement experience support the conclusion that MARS providers generally do not achieve the results that they cause consumers to expect, yet retain the money they collect in advance fees; thus,

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120 *Supra* notes 18-21.

121 15 U.S.C. 45(n) (codifying the Commission's unfairness analysis); *see also In re Int'l Harvester Co.*, 104 F.T.C. 949, 1079, 1074 n.3 (1984), *reprinting* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980).

allowing providers to collect their fees in advance of achieving those results causes or is likely to cause substantial injury to consumers.

Consumers pay up-front fees for mortgage assistance relief services in amounts that range from hundreds to thousands of dollars – fees that many consumers in financial distress find difficult to pay.[122] Yet, few MARS providers perform the services or deliver the results they promise.[123] Law enforcement, both at the federal[124] and state levels,[125] as

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[122] *See, e.g.*, NCRC at 3 ("The high costs of loan modification and foreclosure rescue services may also prevent financially stressed consumers from being able to pay their regular mortgage payment, if they buy into companies' promises. If the company does not deliver, they may be unable to correct the delinquency for lack of these funds."); NAAG at 10 ("Paying the fee upfront likely means that some of the consumer's other bills will not be paid or that the consumer will have to use credit cards or funds from friends or family."); MN AG at 2 ("These advance fees often make it even more difficult for the homeowner – and the loan modification or foreclosure rescue consultant – to effectively resolve the homeowner's financial dilemma.").

[123] *See, e.g.*, *Data Med. Capital, Inc.*, No. SA-CV-99-1266 AHS (Eex), Rep. Temp. Receiver at 4 (C.D. Cal. filed June 19, 2009) (stating the defendants' records show that they provided loan modifications to only 0.37% – 3/8ths of one percent – of their customers); *see also, e.g.*, *FTC v. US Foreclosure Relief Corp.,* No. SACV09-768 JVS (MGX), Prelim. Rep. Temp. Receiver at 2 (C.D. Cal. filed July 15, 2009) ("[O]n [defendants'] applications taken since November 2008, only 11% have resulted in closed modifications."); *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX), Mem. Supp. App. TRO at 19 (C.D. Cal. filed July 7, 2009) ("Nearly every consumer who is promised a loan modification never received any offer to modify their home loans."); *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. June 1, 2009) (alleging defendants only completed loan modifications for about 6% of consumers).

[124] As noted in Section II, since January 1, 2008, the Commission has filed twenty-eight actions against MARS providers for deceptive and other unlawful practices that typically resulted in their failure to provide the promised results. *See* Appendix B.

[125] *See, e.g.*, NAAG at 4 ("As of July 1, 2009, over 450 companies are or have been investigated for providing foreclosure rescue services that violated state laws. Collectively, the states participating in the NAAG group have sued at least 130 of these companies."); *id.* at 6.

well as comments on the record of this proceeding,[126] indicate that there is a widespread failure of MARS providers to perform promised services or achieve promised results. NAAG's written comment, representing the views of state attorneys general who have monitored the activity of MARS providers throughout the country, details these failures in stark terms:

> In our experience, we have found that services provided by foreclosure rescue services companies result only in costs to consumers. There are no benefits. The companies collect an upfront fee that consumers can ill-afford to pay. Consumers then submit financial information to the companies and the companies promise to forward the information to the consumers' loan servicers and obtain a loan modification offer. In the majority of cases, the companies do nothing with the consumers' information. The consumers then end up turning to a non-profit for help, calling their servicers themselves, or falling further behind on their mortgage payments as they wait for the promised loan modification offer that never materializes.[127]

The marketplace does not appear to provide an adequate deterrent to MARS providers failing to perform on their contracts. MARS providers are often new entrants or ephemeral operations with little or no good will in their businesses and rarely provide repeat services to their customers. In these circumstances, the reputational harm from not providing promised services appears to provide little disincentive to nonperformance by MARS providers.

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[126] *See, e.g.*, NAAG at 3 ("As of July 1, 2009, the Office of the Illinois Attorney General had identified roughly 170 companies operating in Illinois that appeared to have offered or were presently offering foreclosure rescue services that violated Illinois state laws. The majority of these companies take impermissible up-front fees and then fail to deliver promised services. . . ."); MN AG at 2 ("As a general rule, these companies provide no service, or at most, simply submit paperwork to the homeowner's mortgage company."); Chase at 1 ("Chase's experience has been that MARS entities disrupt the loan modification process and provide little value in exchange for the high fees they charge.").

[127] NAAG at 6.

Consumers are especially unlikely to obtain the claimed services or results if the MARS provider has promised to obtain a mortgage loan modification that lowers consumers' monthly payments.[128] Many consumers who seek mortgage assistance from MARS providers are not eligible for the mortgage loan modifications that various government programs offer.[129] Apart from these programs, lenders and servicers often are unwilling to modify the terms of mortgage loans or forgive fees and penalties as an alternative to foreclosure.[130] Even if lenders and servicers might be amenable to a modification, many MARS providers do little or no work for their customers, neglecting to contact their lenders or servicers or failing to respond to their requests for basic information.[131]

b. Countervailing Benefits to Consumers and Competition

In analyzing whether an act or practice is unfair, the Commission considers its benefits to consumers and competition in comparison to its harms. The comments

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128 *See, e.g.*, each case in Appendix B.

129 *See, e.g.*, Manuel Adelino *et al.*, *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization* 3 (July 2009), *available at http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf* (finding that lender provided monthly payment-lowering modifications to only 3% of seriously delinquent loans in 2007and 2008); NCLC at 6 (pointing to "[o]ne analysis of statistics for modifications made in May 2009 [which] showed that only 12% reduced the interest rate or wrote-off fees or principal").

130 *Id.*; *see also, e.g.*, Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, 41 CONN. L. REV. 1107, 1111 (2009) (arguing, *inter alia*, that "[n]o single servicer or group of servicer. . . has any incentive to organize a pause in foreclosures or organized deleveraging program to benefit the group").

131 *See supra* notes 62-64.

received do not demonstrate that paying in advance for mortgage assistance relief services has any benefits to consumers. MARS providers, however, have argued generally that charging fees in advance is needed to protect them against the risks of nonpayment by consumers after delivery of the services.[132] These providers point out that most consumers who purchase MARS are in financial distress, so they may not be willing or able to pay the amount owed, and that any judicial remedy against consumers for nonpayment is costly. MARS providers also argue that they require advance fees to pay their ongoing operating costs – *e.g.*, for payroll, office space, and equipment – as well as the direct costs of seeking modifications for consumers, all of which they incur prior to obtaining the modifications.[133] In short, MARS providers claim that it would be impossible or extremely difficult to provide mortgage assistance relief services if they could not charge advance fees, thus depriving consumers of the benefits of those services.

The Commission concludes that the record to date does not show that charging advance fees provides a benefit to consumers. As discussed above, few MARS providers

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[132] TNLMA at 5 ("Nearly all professions, from attorneys to accountants to personal trainers, charge advance fees. . . . The reason these other professions charge fees 'up-front' is to avoid the risk of being 'stiffed' at the end of a laboriously costly effort."). Relatedly, one commenter expressed concern that consumers could "game" a back-end fee model by rejecting the loan modification secured by the provider (in exchange for the fee) and then simply approaching the lender directly to obtain the very same modification for free. *Id.*

[133] *See, e.g.*, Gutner at 1 ("[L]oan modification is not as simple as filling out a few forms and then it is done. Loan modification is a long and involved process. . . . Loan modification companies have expenses just like any other company – payroll, lease, insurance, equipment etc."); TNLMA at 5 ("[MARS providers] incur significant costs before the consumer's mortgage is ready to be modified.").

perform the services or obtain the results promised and, therefore, consumers who pay in advance typically get nothing in return for their payments. The FTC also concludes that the record to date does not demonstrate that charging advance fees benefits competition or the extent of any such benefits, much less that any benefits to competition exceed the harms to consumers from the payment of advance fees. Nothing in the record bears on the nature and extent of the costs, if any, to MARS providers if they cannot operate without charging advance fees, e.g., by capitalizing their business. For example, the record does not address whether MARS providers would be unable to recoup their costs relatively quickly – by achieving promised results for some consumers and collecting the associated fees – even if they were prohibited from charging advance fees. The information the Commission has received and reviewed also does not address the extent to which consumers would not pay the money they are obligated to pay once the services are rendered, or that there are no other means by which providers could protect themselves from the risk of nonpayment.[134] The Commission seeks comment and data bearing on the costs to MARS providers if they cannot charge advance fees for MARS, and the extent to which these costs would prevent them from offering services to consumers.

c. Reasonable Avoidability of Injury

In considering whether an act or practice is unfair, the Commission also considers whether the harm from the practice is reasonably avoidable by consumers. Consumers

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[134] In particular, the Commission seeks comment on the costs and benefits of allowing providers to request or require that consumers place advance fees in an independent third-party escrow or trust to eliminate the risk of nonpayment.

can only reasonably avoid harm if they understand the risk of injury from an act or practice.[135] Consumers also must have available to them an alternative means of avoiding the injury that is not unduly costly to them.[136]

There is nothing in the record that suggests consumers could reasonably avoid the substantial injury caused by having to pay advance fees for MARS. Consumers can avoid the injury only if they are aware of the risks of paying in advance. Especially in light of the prevalence of deception surrounding these services, consumers are unlikely to know of the substantial risk that the provider will not perform as promised.

MARS providers also do not appear to compete on the basis of when fee collection takes place. Based on the current record, it appears that nearly all MARS providers charge up-front fees for their services.[137] Thus, even if consumers were aware of the risk that MARS providers will not perform, as a practical matter they might not have the option of protecting themselves by choosing a provider that charges only after services are rendered. At the very least, the search costs in identifying such providers would pose a significant deterrent for consumers in financial distress. Thus, consumers

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[135] *See In re Int'l Harvester Co.*, 104 F.T.C. at 1073 (Unfairness Policy Statement); *In re Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 at 366 (1986), *aff'd*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

[136] *In re Orkin Exterminating Co., Inc.*, 108 F.T.C. at 374-75 (Oliver, Chm., concurring).

[137] Specifically, in its law enforcement actions, the Commission has not observed any MARS providers that did not charge up-front fees to consumers. *See* Appendix B. Additionally, none of the comments submitted in response to the ANPR cite any example of MARS providers employing a different fee model.

who seek mortgage assistance relief services cannot reasonably avoid the substantial harm associated with being charged an advance fee for those services.

In addition, consumers who have paid in advance, only to discover that the providers have not provided the promised services or result, typically cannot mitigate their harm by seeking a refund. Most MARS providers do not provide refunds to consumers;[138] indeed, providers commonly make false claims about the availability of refunds.[139] Ultimately, many consumers of mortgage assistance services are never able to recover the amount of the advance payment they made to a MARS provider who neither performed promised services nor delivered promised results.[140]

Having paid in advance and not received a refund, the only remaining recourse consumers would have for a nonperforming MARS provider is to file a lawsuit for breach of contract, hardly a viable option for financially-distressed consumers who might be

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138 *See supra* note 59.

139 Even if a MARS provider gave refunds, consumers would have been deprived of the use of the money they paid for their advance fee for the period of time from when the contract was signed until the refund was provided. Financially distressed consumers facing the prospect of losing their homes suffer injury from being deprived of the use of hundreds or thousands of dollars during this critical period of time when they are trying to stay current on their mortgages and pay other expenses. Thus, a refund would not eliminate the injury from having to make advance payments. It is established law under Section 5 that offering a refund is not a defense to a charge that a marketer misrepresented its product or service. *See, e.g.*, *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261-62 (7th Cir. 2002); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994); *In re Sears, Roebuck and Co.*, 95 F.T.C. 406, 518 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

140 *See, e.g.*, *Door-to-Door Sales Rule Statement of Basis and Purpose*, 40 FR at 53523 ("Consumers are clearly injured by a system which forces them to bear the full risk and burden of sales related abuses. There can be little commercial justification for such a system.").

facing imminent foreclosure.[141] Many consumers who are in financial distress are not sophisticated in legal matters and may not be aware that filing an action against the MARS provider for breach of contract is available as an alternative. More significantly, the cost of litigating makes it impossible or impractical for many consumers to seek legal recourse. Thus, the possibility of taking legal action does not sufficiently mitigate the harm to consumers from paying an advance fee.

Based on the forgoing analysis, the Commission believes that charging an advance fee for mortgage assistance relief services is an unfair practice. The Commission reached the same conclusion in its TSR with respect to the charging of an advance fee for credit repair services, money recovery services, and guaranteed loans or other extensions of credit.[142] As is true in this proceeding, the Commission found in the TSR proceeding that companies selling those products or services routinely misrepresented the services they would perform or the results they would achieve, and that consumers paying advance fees would incur all of the risk of nonperformance. The TSR therefore prohibits telemarketers of such products or services from charging an advance fee.[143]

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141 *In re Orkin Exterminating Co.*, 108 F.T.C. 263 at 374-75 (Oliver, Chmn., concurring) (suing for breach of contract is not a reasonable means for consumers to avoid injury).

142 *See Telemarketing Sales Rule Statement of Basis and Purpose*, 68 FR 4580, 4614 (Jan. 29, 2003) *(TSR Statement of Basis and Purpose)*.

143 *See* 16 CFR 310.4(a). Note that, although the TSR declares the charging of advance fees in this context to be "abusive" – the term used in the Telemarketing Act – the Commission used the unfairness analysis set forth in Section 5(n) of the FTC Act to support this declaration. *See TSR: Notice of Proposed Rulemaking*, 67 FR 4492, 4511 (Jan. 30, 2002).

d. Public Policy Concerning Advance Fees

Section 5(n) of the FTC Act permits the Commission to consider established public policies in determining whether an act or practice is unfair, although those policies cannot be the primary basis for that determination. There are strong public policies against charging advance fees for MARS as shown by the 20 or more state laws that prohibit this practice because of its adverse effect on consumers.[144] Consistent with these statutes and their law enforcement experience, 46 states filed comments strongly advocating that the Commission issue a rule that prohibit the charging of advance fees for MARS.[145] The Commission believes that these state laws provide further support for its finding that this practice is unfair.

2. The Advance Fee Ban to Help Prevent Deception

As a second basis for imposing an advance fee ban, the Commission believes that such a ban is reasonably related to the goal of protecting consumers from widespread deception in the offering of MARS. The Commission has authority not only to prohibit conduct that is itself unlawful, but also may impose additional relief that is reasonably related to restraining unlawful conduct.[146]

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144 *See supra* note 76.

145 *See* NAAG at 9; MN AG at 4; MA AG at 2; OH AG at 3.

146 The Commission exercises similar discretion in crafting orders to resolve law violations. *Cf. FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957) ("[T]he Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist."); *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952) ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."); *Jacob Seigel Co. v. FTC*, 327 U.S. 608, 611-12 (1946)

As detailed in Section II of this document, MARS providers commonly make claims as to the services they will provide or the results they will obtain. These claims induce consumers to pay up-front fees of hundreds or thousands of dollars for services and results the providers typically do not deliver. Because the likelihood of consumers pursuing judicial remedies against nonperformance is small, MARS providers have little incentive to perform, and in fact many do not.[147] The advance fee ban proposed in § 322.5 realigns the incentives of the MARS provider to deliver on its promises because it will not be paid until it does so.[148] Thus, the ban would help to prevent the deceptive performance claims providers frequently make.[149]

("The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce.").

147 *See supra* notes 123-26.

148 *See, e.g.*, NAAG at 10 ("The risk of not receiving payment provides the strongest possible incentive for mortgage consultants to promptly and adequately provide all promised services. Plus, if the consultant provides good services and the consumer obtains an affordable loan modification, the consumer should be in a better position financially to pay the consultant."); *id.* at 11 ("The incentives created for fraudulent companies to enter into this industry by allowing payment of advance fees cannot be mitigated through disclosures. The only way to ensure that companies are actually working for consumers is to require them to produce results before the consumers make payment."); NCLC at 5, 8 ("Requiring these companies to obtain the promised loan modification as a condition of being paid will substantially reduce their incentive for making false or inflated promises of foreclosure assistance."); MN AG at 4 ("A prohibition on up-front fees also provides the strongest incentive for loan modification and foreclosure rescue companies to provide adequate services . . . .").

149 Although the proposed Rule prohibits deceptive representations and mandates certain disclosures, there is no assurance that these remedies would be effective in every case, or that all providers will abide by them. An advance fee ban thus also may be needed to prevent deception. The Commission in the TSR prohibited the collection of advance fees from credit repair services, money recovery services, and guaranteed loans or other extensions of credit even though the Rule also banned deceptive claims and required disclosures in marketing those products and services. *See* TSR, 16 CFR 310.1,

3. The Ban on Advance Payments in the Proposed Rule

Section 322.5(a) of the proposed Rule provides that:

> It is a violation of this rule for any mortgage assistance relief service provider to request or receive payment of any fee or other consideration until the provider has: (1) achieved all of the results (i) the provider represented, expressly or by implication, to the consumer that the service would achieve, and (ii) that are consistent with consumers' reasonable expectations about the service and (2) provided the consumer with documentation of such achieved results. . . .

The Commission intends for this provision to prevent a MARS provider from requesting or receiving any fees or any other form of compensation, including an equity stake in consumers' property, until it achieves the results that its claims cause consumers to expect or that consumers reasonably expect given the type of service sold. Thus, the performance that MARS providers must complete before collecting fees is those results that are represented, expressly or by implication, to prospective consumers and that are consistent with the purpose for which the service is sold.

Section 322.5(1)(i) prohibits a MARS provider from collecting a fee until it has achieved each result "represented, expressly or by implication, to the consumer that the service would achieve." In determining what representations consumers take away from providers' communications, the Commission will employ its traditional tools of claims construction. Thus, an advertisement or other communication will be deemed to convey a claim if consumers, acting reasonably under the circumstances, would interpret the communication to convey that message.[150] The message may be conveyed by innuendo

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et seq.; *TSR Statement of Basis and Purpose*, 68 FR 4580.

[150] *See Kraft, Inc.*, 114 F.T.C. 40, 120 (1991), *aff'd*, 970 F.2d 311 (7th Cir. 1992).

as well as by express statements.[151] The Commission looks to the overall, net impression created by the communication, rather than focusing on the individual elements in isolation.[152] Information intended to qualify a claim must be presented in a clear and prominent manner; fine print disclosures in advertisements or contracts generally are ineffective to change the meaning of statements that appear in the body of a communication.[153]

In addition, under § 322.5(a)(1)(ii), before a MARS provider can collect any payment, it also must achieve all those results "that are consistent with the consumers' reasonable expectations about the service." Using traditional principles of claim interpretation, the Commission believes that even general efficacy claims (*e.g.*, "our service will help you with your mortgage") are likely to convey that consumers can expect to achieve a result consistent with the purpose of the product or service,[154] that the

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151 *See Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir.).

152 *See Cliffdale Assocs.*, 103 F.T.C. at 179 & n.32 (Deception Policy Statement).

153 *Id.* at 180-81 ("Written disclosures or fine print may be insufficient to correct a misleading representation. . . . Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission. Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser. Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices."). To be effective, disclosures must be clear and conspicuous. *See, e.g.*, *Thompson Med. Co. v. FTC*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *United States v. Bayer Corp.*, No. CV-00-132 (D.N.J. Jan. 11, 2000) (consent decree).

154 *FTC v. Chrysler Corp.*, 561 F.2d 357 (D.C. Cir. 1977); *Feil v. FTC*, 285 F.2d 879, 885-87 & n.19 (9th Cir. 1960); *In re J.B. Williams*, 68 F.T.C. 481, 542-43 (1965).

result will be beneficial to them,[155] and that the benefit will be substantial.[156] Even in the absence of claims that a specific result will be achieved, reasonable consumers thus are likely to interpret an advertisement as promising results consistent with the purpose of the product or service.[157] The act of offering the MARS for sale obligates the provider to

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[155] For example, in a legitimate short sale, the property is sold for a price that is less than the debt owed on the mortgage, but the lender agrees to take this lesser amount as full satisfaction of the debt. A short sale is intended to result in less damage to a consumer's credit rating than a foreclosure. Some purported "short sales" are detrimental to consumers, however. *See, e.g.*, NCLC at 17-18 (expressing concern about "short sale" scams). Some MARS providers that purportedly help the consumer to sell the property "short" conceal the actual sale price amount from the lender, leaving the consumer liable for the difference and owing taxes on a larger forgiven balance than necessary. This would not be considered a beneficial result for the consumer, and thus the MARS provider could not collect a fee for it.

[156] An efficacy claim conveys to consumers that the result or benefit will be meaningful and not *de minimis*. *See P. Lorillard Co. v. FTC*, 186 F.2d 52, 57 (4th Cir. 1950) (challenging advertising that claimed that the cigarette was lowest in nicotine, tar and resins in part because the difference was, in fact, insignificant); *Sun Co.*, 115 F.T.C. 560 (1992) (challenging advertising for octane gasoline that represented gas would provide superior power that would be significant to consumers); Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR 255.2 (2009) ("An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use."); Guides for the Use of Environmental Marketing Claims,16 CFR 260.6(c) (1998) ("Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible."); *FTC Enforcement Policy Statement on Food Advertising*, 59 FR 28388, 28395 & n.96 (June 1, 1994), *available at http://www.ftc.gov/bcp/policystmt/ad-food.shtm* ("The Commission shares FDA's view that health claims should not be asserted for foods that do not significantly contribute to the claimed benefit. A claim about the benefit of a product carries with it the implication that the benefit is significant.").

[157] *See, e.g.*, *In re International Harvester Co.*, 104 F.T.C. 949, 1058-59 (1984) (implied representations may arise from "ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good," *i.e.*, "by the very act of offering goods for sale the seller impliedly represents that they are reasonably fit for their intended uses.")

achieve at a minimum results that are consistent with the results consumers reasonably expect to receive from such a service.[158]

The proposed Rule mandates that providers achieve a defined result if they promise consumers a loan modification. Specifically, the Commission believes that a MARS provider's representation that it will negotiate, arrange, or obtain a loan modification (which may include modifying the interest rate, principal amount, or the term of the loan) implies to reasonable consumers that they will receive a reduction in their mortgage obligation, that the result will be permanent, and that the benefits will include a substantial decrease in the amount of their monthly payments for a meaningful period of time. Accordingly, § 322.5 provides that if a MARS provider makes an express or implied representation that it will "negotiate, obtain, or arrange a modification of any dwelling loan," it must obtain a "mortgage loan modification" for the consumer before it can collect any fee or other consideration.

Under proposed § 322.5, the required "mortgage loan modification" that must be provided prior to payment is a *permanent* contractual change to the mortgage that substantially reduces the borrower's scheduled periodic payments. The reduction must be permanent for a period of at least five years or a reduction that will become permanent once the consumer successfully completes a trial period. Many MARS providers attempt to persuade consumers to accept repayment plans or forbearance agreements as a substitute for a promised loan modification.[159] Such plans and agreements do not result

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158 *Id*.

159 *See, e.g.*, *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX), Mem. In Supp. of Ex Parte TRO, Ex. 10 (C.D. Cal. filed July 13, 2009); *FTC v. Fed.*

in a permanent decrease in monthly payments, but tend to increase the amount that consumers owe each month on their mortgages, either immediately or in the near future when the forbearance period ends. Under the proposed Rule, a loan modification must *reduce* the consumer's scheduled periodic payments, and that reduction must be *substantial*, *i.e.*, a meaningful reduction that makes the loan affordable for that consumer.

The proposed ban on advance fees prohibits MARS providers from requesting or collecting advance fees for any represented service until *all* of the results promised, expressly or by implication, are delivered. This prevents MARS providers from charging for their services piecemeal.[160] If, for example, consumers reasonably expect that at the end of the process they will receive a particular outcome, such as a short sale or deed-in-lieu of foreclosure transaction, the MARS provider cannot require the consumer to pay a fee for an initial consultation or subsequent fees on a periodic basis as it purportedly performs various steps to achieve that outcome. The

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Loan Modification Law Ctr., LLP, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009), Reply to Resp. Order to Show Cause at 7 (C.D. Cal. filed Apr. 22, 2009).

[160] Without such a prohibition, MARS providers might attempt to charge consumers for discrete tasks that fall short of the full service or result promised, such as collecting a fee once they conduct an initial consultation with the consumer; review or audit the consumer's mortgage loan documents; gather financial or other information from the borrower; send an application or other request to the lender or borrower; facilitate communications between the borrower or servicer; or respond to particular requests from the lender or borrower on behalf of the consumer. *See, e.g.*, NAAG at 5 ("We are now seeing consultants offering these services piecemeal. For example, some companies represent they will help consumers gather their financial documents and prepare the information to submit to their mortgage servicer for a fee. Then, for another fee, the companies represent that they will facilitate communication between the consumers and their mortgage servicer.").

provider cannot collect any fee until after the favorable result marketed ultimately has been achieved for the consumer.[161]

Under proposed § 322.5, MARS providers must provide the consumer with documentary proof of completed services and achieved results before requesting or collecting payment. The Commission intends for the required documentation to be the most comprehensive written instrument memorializing the loan holder's agreement to offer the represented concession to the consumer. In the case of promised loan modifications, the proposed Rule specifies that documentation must be a "written offer from the dwelling loan holder or servicer to the consumer." Likewise, the MARS provider must provide documentation in the form of a written offer from the lender or servicer setting forth other concessions, such as a forbearance agreement, short sale or deed-in-lieu of foreclosure transaction; waiver of an acceleration clause; opportunity to cure default or reinstate a loan; or repayment plan.

4. Alternatives to an Advance Fee Ban

In proposing an advance fee ban, the Commission has considered and, at this stage, decided against imposing alternative restrictions on MARS providers. However, it seeks comment on these alternatives – in particular, on whether the Commission should: (1) limit or cap advance fees instead of banning them outright; (2) allow MARS

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[161] The MARS provider cannot evade this prohibition by refraining from making any explicit claim about the result it will achieve (such as a loan modification) and instead offering to provide specific mortgage relief-related services, such as a review of consumers' loan documents. Such offers are likely to convey to reasonable consumers that they will receive the ultimate result that is the purpose for which they are entering into the transaction. Thus, proposed § 322.5(b) requires MARS providers to obtain the loan modification or other remedy before requesting or collecting any fee.

providers to use independent third-party escrow accounts to hold fees until they achieve the results; and (3) include a right of rescission.

First, the Commission seeks comment on whether, instead of banning fees outright, the proposed Rule should permit MARS providers to charge a small up-front fee or to collect fees as they perform services preliminary to obtaining the result that are commensurate with those services.[162] As detailed above, the FTC believes that charging hundreds or thousands of dollars in advance for MARS is unjustified based on the current record. However, the Commission seeks comment on whether there are MARS providers currently operating that charge a small up-front fee (such as $50 - $100) or collect fees as they perform preliminary services, and then successfully deliver results to their customers. Based on the current record, the FTC is not aware of such entities.

Second, the Commission seeks comment on whether, in the event the Rule bans advance fees, MARS providers should be allowed to request or require that consumers place any such fees in an escrow account. Under this approach, an escrow agent could administer the account to ensure that MARS providers receive payment if and only if they successfully provide the ultimate results. Based on the Commission's law enforcement experience, as well as the views of state law enforcement officials and consumer groups,[163] however, the Commission is concerned that MARS providers might

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[162] For example, Maine's statute regarding MARS providers limits them to a $75 up-front fee. *See* ME. REV. STAT. ANN. tit. 32, § 6174-A.

[163] *See, e.g.*, NAAG at 10 ("By fees, we mean any transfer of money whatsoever from consumers to consultants. This includes monies placed in escrow, holds placed on credit cards, and checks that are post-dated."); NCLC at 4 ("Companies should not be permitted to evade an advance fee ban by taking the money 'in trust' until the 'services' are performed.").

improperly obtain access to MARS funds in escrow accounts.[164] The Commission seeks comment on whether escrow accounts protect consumers adequately in other types of financial transactions, whether such escrows could be used in the context of mortgage assistance relief services and, if so, what restrictions or limitations should be placed on their use.

Third, the Commission seeks comment on whether the proposed Rule should include a right of rescission. A right of rescission, often called a "cooling-off period," would allow consumers to cancel their agreements with a MARS provider for a certain period after entering into the agreement. Several commenters recommended that the Commission include such a provision in the proposed Rule.[165] Additionally, most state MARS statutes provide a right of cancellation.[166] In light of the acute financial and emotional distress faced by consumers of MARS,[167] consumers often may not have or take the time needed, or obtain the information necessary, to consider carefully their

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164 *See, e.g.*, *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX), Decl. Thomas Layton (C.D. Cal. filed July 16, 2009) (stating that attorney improperly transferred 90% of funds from client trust accounts associated with loan modification services to other non-attorney business partners).

165 *See, e.g.*, NAAG at 9; MN AG at 3-4; NCLC at 12; CRC at 4-5.

166 *See supra* note 76.

167 *See MARS ANPR*, 74 FR at 26134-35.

options before deciding to purchase these services.[168] A right of rescission would serve to provide consumers with additional time to make decisions.

At this time, the Commission believes that a right of rescission is not needed to protect consumers if MARS providers are banned from collecting advance fees. The Commission seeks comment on whether a right of rescission would be adequate to protect consumers in lieu of an advance fee ban or, alternatively, whether it would be beneficial to consumers as a complement to an advance fee ban. It also seeks comment on, to the extent such a provision were included in the Rule, the appropriate period of time after consumers enter into the agreement that they should be able to rescind their agreements with MARS providers.

F. Section 322.6: Assisting and Facilitating

1. Background

Many MARS providers engaged in deceptive or unfair practices rely on, or work in conjunction with, other entities to advertise and operate their businesses. These entities may provide a wide variety of critical support and assistance, including advertising services, telemarketing and other marketing support,[169] payment

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[168] The Commission has previously issued regulations providing for a rescission period in circumstances in which the context of the transaction made it difficult for consumers to make well-informed purchasing decisions. *See* Door-to-Door Sales Rule, 16 CFR 429.1, *et seq*.; Trade Regulation Rules: Mail or Telephone Order Merchandise (Mail Order Rule),16 CFR 435.1(c) (1993); *see also Door-to-Door Sales Rule Statement of Basis and Purpose*, 37 FR 22943, 22937.

[169] *See, e.g.*, *FTC v. Kirkland Young, LLC*, No. 09-23507, Mem. Supp. of Emer. Mot. for TRO at 9 (S.D. Fla. filed Nov. 24, 2009).

processing,[170] and the back-end handling of consumer files.[171] In providing this support and assistance, such entities often know, or consciously avoid knowing, that the MARS providers whom they assist are engaging in deceptive or unfair conduct.[172]

MARS providers, for example, often purchase the contact information of potential customers from so-called "lead generators." These lead generators, in turn, often rely on a network of Internet advertisers to drive traffic to their websites so that they can obtain consumers' information.[173] Lead generators have provided contact information of potential customers to many of the MARS providers that the Commission has challenged in its law enforcement actions.[174] Additionally, some lead generators themselves

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170 *See, e.g.*, *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX), Pls. Opp. Mot. Decl. Relief at 5 (C.D. Cal. filed Nov. 20, 2009) (alleging that payment processor for defendant loan modification company had "actual knowledge that the credit card charges [it] processed for [the defendant] were for advance fees in violation of relevant consumer protection laws"). In other industries, the FTC has sued payment processors for charging consumers for products or services despite indications that those products or services were illusory. *See, e.g.*, *FTC v. InterBill, Ltd*., No. 06-cv-01644-JCM-PAL (D. Nev. Jan. 8, 2007); *FTC v. Your Money Access, LLC*, No. 07-5174 (E.D. Pa. filed Dec. 11, 2007).

171 *See, e.g.*, *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx), Reply to Resp. Order To Show Cause at 9 (C.D. Cal. filed April 22, 2009) (alleging that defendants contracted with another entity to process backlog of consumer files and negotiate with lenders on behalf of those consumers).

172 *See supra* notes 170-71.

173 Additionally, advertising affiliate network companies may serve as intermediaries between individual advertisers and lead generator websites.

174 *See, e.g.*, *FTC v. Kirkland Young, LLC*, No. 09-23507, Mem. Supp. of Emer. Mot. for TRO at 9 (S.D. Fla. filed Nov. 24, 2009) (alleging that defendant employed lead generators to leave messages with consumers via outbound telemarketing calls); *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009); *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009).

disseminate claims to consumers, and the Commission has challenged some of these claims as deceptive in violation of Section 5 of the FTC Act.[175]

To address the conduct of those who provide key support to MARS providers engaged in unlawful conduct, the proposed Rule prohibits any person from providing substantial assistance or support to a MARS provider if that person knows or consciously avoids knowing that the provider is violating any provision of the proposed Rule. Proposed § 322.6 thus would allow FTC and state law enforcement officials to obtain monetary and injunctive relief against those who knowingly help MARS providers engaged in conduct that harms consumers. The Commission believes that (1) it is an unfair act or practice to knowingly or with conscious avoidance provide substantial assistance or support to those engaged in unlawful conduct; and (2) prohibiting such assistance is reasonably related to the goal of preventing the deceptive or unfair practices of MARS providers.

2. Substantial Assistance or Support as an Unfair Practice

Applying the three-prong test under Section 5(n) of the FTC Act, the Commission tentatively concludes that it is unfair to knowingly (or with conscious avoidance) provide substantial assistance or support to a MARS provider engaged in

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[175] *See United States v. Ryan*, No. 09-00173-CJC (C.D. Cal. filed July 14, 2009) (criminal complaint against lead generator named as defendant in FTC action); *FTC v. Thomas Ryan*, No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC v. Sean Cantkier*, No. 1:09-cv-00894 (D.D.C. amended complaint filed July 10, 2009). The Commission also has alleged the involvement of lead generators in deception and abusive practices in other contexts, including deceptive or abusive telemarketing and payday lending practices. *See, e.g.*, *We Give Loans, Inc.*, Docket No. C-4232, FTC File No. 072 3205 (FTC Sept. 5, 2008) (complaint) (payday loans); *United States v. Voice-Mail Broad. Corp.*, No. CV-08 MMM (JTLx) (C.D. Cal. filed Jan. 29, 2008) (telemarketing).

violations of the proposed Rule. A person engaged in such conduct causes substantial injury to consumers that is not offset by benefits to consumers or competition, and consumers cannot reasonably avoid the injury.[176]

Persons who knowingly provide substantial assistance or support to a MARS provider engaged in unlawful practices significantly enhance the provider's ability to engage in the conduct and greatly increase the scope of the injury the practices cause. For example, a lead generation company may possess the contact information of thousands of consumers that otherwise might be unavailable to a small MARS provider. The MARS provider could use that information to target in a cost-effective manner many more consumers with deceptive marketing advertisements or pitches than it could in the absence of such information. Thus, entities such as lead generators often play a key role in enabling MARS providers to promote their services widely, leading to substantial injury to consumers if those providers collect advance fees but fail to deliver on their promises.

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[176] In law enforcement actions, the Commission has alleged that entities that offered substantial assistance to another engaged in unlawful acts were themselves engaged in unfair practices in violation of Section 5 of the FTC Act. *See, e.g.*, *FTC v. InterBill, Ltd.*, No. 06-cv-01644-JCM-PAL (D. Nev. filed Jan. 8, 2007); *FTC v. Your Money Access, LLC*, No. 07-5174 (E.D. Pa. filed Dec. 11, 2007). Federal court decisions have held that such conduct is unfair in violation of Section 5. *See, e.g.*, *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (S.D. Cal. 2008) (holding that defendants engaged in unfair acts by creating checks they knew were often requested by unauthorized parties); *FTC v. Accusearch*, *Inc.*, No. 06-CV-105-D, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007) (holding that defendants engaged in unfair practices by selling phone records obtained by other parties through deception); *FTC v. Windward Mktg.*, No. Civ.A. 1:96-CV-615F, 1997 WL 33642380 (N.D. Ga. Sept. 30, 1997) (holding that defendants engaged in unfair acts by depositing unauthorized bank drafts obtained by a deceptive telemarketing operation).

The Commission is not aware of any benefits to consumers or competition from knowingly assisting or supporting providers in violating the proposed Rule. The Commission seeks comment on whether there are benefits to consumers or competition from this conduct and, if so, whether those benefits outweigh the harms they cause to consumers.

Finally, the substantial injury caused by knowingly providing substantial assistance or support in this context is not reasonably avoidable by consumers. Consumers do not know that the MARS providers with whom they contract are engaged in unlawful conduct, much less those who assist or facilitate the providers.

3. Prohibiting Substantial Assistance or Support to Prevent Deception

The Commission believes that proposed § 322.6 is warranted for the purposes of preventing deceptive and unfair conduct by MARS providers. As noted above, MARS providers frequently rely upon the assistance and support of other entities for essential tasks such as identifying potential customers, marketing, back-room operations, and payment processing. These support entities make it possible for deceptive MARS providers to efficiently target, enroll, and process consumers on a wide scale. Prohibiting the knowing substantial assistance or support of MARS providers engaged in illegal acts is reasonably related to preventing deceptive or unfair practices by MARS providers.

4. The Proposed Provision

Section 322.6 of the proposed Rule prohibits any person from providing "substantial assistance or support" to any MARS provider if the person "knows or

consciously avoids knowing that the provider is engaged in any act or practice that violates the Rule." This provision is modeled on a similar provision in the TSR.[177]

Proposed § 322.6 is limited to persons providing *substantial – i.e.*, more than casual or incidental – assistance or support to MARS providers.[178] Activities that might constitute substantial assistance or support include the provision of consumer leads,[179] contact lists, advertisements, or promotional materials.[180] Such activities also might include the support provided by payment processors[181] and other entities providing essential backroom operations.

In addition, proposed § 322.6 is limited to persons who know or consciously avoid knowing that the MARS provider is violating the Rule. As the Commission concluded in the context of the TSR, "[t]he 'conscious avoidance' standard is intended to capture the situation where actual knowledge cannot be proven, but there are facts and

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[177] *See* 16 CFR 310.3(b). The Telemarketing Sales Act gave the Commission the express authority to prohibit assisting and facilitating another in violating the TSR. Although the Omnibus Appropriation Act, as clarified by the Credit CARD Act, did not provide comparable authority, the Commission believes, as discussed earlier, that assisting and facilitating another in violating the MARS Rule is itself an unfair act or practice, and in addition that prohibiting this conduct is reasonably related to the goal of preventing unfair and deceptive conduct.

[178] *See TSR Statement of Basis and Purpose*, 60 FR 43842, 43852 ("The Commission further believes that the ordinary understanding of the qualifying word 'substantial' encompasses the notion that the requisite assistance must consist of more than mere casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the Rule.").

[179] *See, e.g.*, *FTC v. Patten*, No. 08-5560 (N.D. Ill. filed Sept. 29, 2008).

[180] *See id.*

[181] *See, e.g.*, *FTC v. Your Money Access, LLC*, No. 07-5174 (E.D. Pa. filed Dec. 11, 2007).

evidence that support an inference of deliberate ignorance on the part of a person that the seller or telemarketer is engaged in an act or practice that violates [the Rule]."[182] Proposed § 322.6 similarly excludes entities that provide basic support and services to MARS providers, but have no reasonable way of knowing that the providers are engaged in conduct in violation of the Rule.

G. Section 322.7: Exemptions

Section 322.7 of the proposed Rule addresses the applicability of the Rule's provisions to attorneys who are MARS providers. There is no general exemption for attorneys from the requirements of the proposed Rule. The Commission, however, proposes a limited exemption for licensed attorneys' conduct in connection with a bankruptcy case or other court proceeding to prevent foreclosure, where that conduct complies with state law, including rules regulating the practice of law. Attorneys who meet these criteria would be exempt from the proposed Rule's prohibitions against requesting or collecting advance fees. Additionally, attorneys would be exempt from the Rule's prohibition against advising consumers to cease contact with their lenders or servicers. Note, however, that all attorneys would continue to be subject to the proposed Rule's prohibition against misrepresentations, disclosure requirements, prohibition against knowing substantial assistance or support, and recordkeeping requirements.

182 *TSR Statement of Basis and Purpose*, 60 FR at 43852.

1. Background

As discussed in Section II, an increasing number of attorneys have engaged in deception and unfairness in connection with mortgage assistance relief services.[183] For example, in its written comment, the Illinois Attorney General reported that "33 percent of the [MARS] companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession."[184] Including attorneys within the proposed Rule is necessary to ensure that the rule is effective in preventing such conduct.

The Commission, however, recognizes that legal counsel may be valuable to some consumers who are trying to save their homes. Frequently, consumers will turn to attorneys for legal assistance with bankruptcy or other legal proceedings regarding their mortgage.[185] Consumers also may seek legal advice that may not necessarily be connected to a legal proceeding. For example, attorneys may conduct a review of mortgage contracts to determine legal options and obligations, which may aid the

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[183] *See supra* notes 46-48, 66-68. In fact, the State Bar of California recently reported a "crisis" of attorney misconduct, noting that it "has experienced a 58 percent increase in active investigations over 2008 due in large part to the huge increase in complaints against attorneys offering loan modification services." *See* Press Release, State Bar of California, *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Sept. 18, 2009), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395*; *see also* CRC at 6.

[184] IL AG at 1.

[185] *See, e.g.*, NCLC at 14 (noting that attorneys could "fil[e] a bankruptcy petition or . . . suit challenging a predatory loan or a defense to foreclosure" and provide other non-litigation legal services including "negotiating a settlement with a lender"); OH AG at 5 ("The knowledge an attorney has of his or her state's foreclosure law can properly help borrowers navigate the foreclosure process."); MA AG at 7 (noting that "a competent and ethical attorney can be a valuable asset to a homeowner trying to avoid foreclosure").

attorney in negotiating with a servicer on behalf of a consumer.[186] Under the proposed Rule, in the absence of an exemption, attorneys would be prohibited from using certain methods of collecting fees when they provide MARS to consumers. For example, attorneys representing clients in bankruptcy and other court proceedings often collect advance fees in the form of retainers, which usually must be placed in escrow.[187] Section 322.5 of the proposed Rule would prohibit the collection of such fees. In addition, attorneys performing bona fide legal services routinely advise clients to cease any direct communication with outside parties, such as lenders and servicers, and to refer all communications from these outside parties to the attorneys. Section 322.3(a) of the proposed Rule bars giving this instruction to consumers.

In the Commission's view, the present record[188] does not support a broad exemption for attorneys. Some attorneys have engaged in various forms of deceptive and unfair conduct in conducting activities covered by the proposed Rule. First, some attorneys have engaged in the same deceptive practices as non-attorney MARS providers, *i.e.*, failing to provide promised services, falsely touting high likelihoods of success, misrepresenting their refund policies, and falsely claiming an affiliation with the

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186 *See* NCLC at 14 (noting that "an attorney's more beneficial and traditional role of analyzing a client's paperwork and advising the client of potential claims and options may also fit within the definition of mortgage assistance relief").

187 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15 (2009).

188 Note that the Commission did not receive any comments in response to its ANPR from attorneys or organizations representing attorneys addressing the role of attorneys in connection with providing loan modification services. To have a complete and accurate understanding of the role of attorneys in connection with loan modification services, the Commission seeks comment from attorneys and other interested parties on this issue.

government or other entities.[189] Second, some MARS providers have begun employing or associating with attorneys to (1) support the MARS providers' (often false) claims that they provide legal services and (2) try to avail themselves of attorney exemptions under various state laws governing MARS.[190] In such attorney-MARS provider arrangements, the attorneys often do little or no legal work on behalf of consumers,[191] with non-attorneys handling most functions, including communications with the lender or

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[189] *See supra* notes 46-47; *see also, e.g.*, NAAG at 13 ("We have received many complaints regarding attorneys who are offering loan modification business. These attorneys generally provide no legal services for consumers and present the same problems as mortgage consultants in general."); Drexel Testimony, 111th Cong. 1st Sess. at 6 ("[A] certain number of attorneys are willing to engage in these fraudulent activities on their own.").

[190] *See* IL AG at 2 ("Attorneys are using the exemption to market and sell the same mortgage consulting services provided by non-attorneys."); CSBS at 2 (noting "attorneys who lend their name to a loan modification company, but play, little, if any direct role, in helping consumers obtain actual loan modifications"); MN AG at 5 ("The Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law."); CRC at 2 ("An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services, sometimes engaging in fee-splitting or even simply acting as fronts for loan modification companies who are seeking to avoid state laws that prohibit some of the practices described above but exempt attorneys."); California State Bar Ethics Alert at 2 ("There is evidence that some foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations."); *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX), Mem. Supp. Pls. Ex Parte App. at 3 (C.D. Cal. Aug. 3, 2009) (alleging that "Walker Law Group" was "a sham legal operation designed to evade state law restrictions on the collection of up-front fees for loan modification and foreclosure relief").

[191] *See, e.g.*, IL AG at 2 ("While attorney mortgage consultants charge a premium for their services and aggressively market their status as legal professionals, they generally exclude – either expressly or in practice – actual legal representation or legal work from the scope of provided services."). Some MARS providers advertise the provision of legal services to consumers but then later disclaim, in fine print contracts, that they will actually provide such services. *See id.* at 2-4, 7.

servicer.[192] The Commission's law enforcement experience, as well as that of state attorneys general, indicates that MARS providers often induce consumers to believe that they will receive specialized legal assistance from attorneys, even though the attorneys have done little more than lend their names and credentials to the operation.[193]

Many state MARS statutes contain relatively broad exemptions for attorneys. For example, some states exempt attorneys so long as they are licensed in the same state as the borrower or have an attorney-client relationship with the borrower.[194] Attorneys

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[192] *See, e.g.*, Chase at 5 ("Many MARS providers claim to be affiliated with attorneys, but typically the people performing the services are not attorneys, and the connection with the attorney is very tenuous. Calls to the MARS provider do not go to the attorney's office and addresses used by the providers are not the same as the attorney's."); OH AG at 5 ("[A]t most the lawyer [advertised to consumers by foreclosure rescue companies] will file a brief template response on behalf of the consumers."); *see also* Drexel Testimony at 6 ("In exchange for the use of the attorney's name and his or her ability to charge and receive advance fees, the foreclosure consultant typically offers to perform most or all of the loan modification services . . . ."); Press Release, State Bar of California, *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Nov. 25, 2009) ("[T]he attorneys work with untrained non-attorney staff engaging in the unlawful practice of law by offering legal advice to prospective clients. [The Office of Trial Counsel] also is investigating the non-attorney staff for possible referral to law enforcement."), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395*; *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX) (C.D. Cal. filed July 7, 2009).

[193] *See, e.g.*, *supra* note 46; *see also* CMC at 10 ("[The attorneys'] communications [with the consumer] are generally 'boilerplate' that does not appear to reflect any considered review by an attorney."); OH AG at 5 ("[O]ur office sees foreclosure rescue companies advertise that they will provide a lawyer or legal help to that consumer. The lawyer's client, however, is actually the company, not the consumer, and at most the lawyer will file a brief template response on behalf of the consumers"); IL AG at 2.

[194] *See, e.g.*, COLO. REV. STAT. § 6-1-1103(4)(b)(I); 765 IL. COMP. STAT. ANN. 940/5; MO. REV. STAT. § 407.935(2)(b)a; *see also, e.g.*, NAAG at 13 ("Currently, most states exempt attorneys from their mortgage rescue consultant laws."); CMC at 9-10.

offering MARS often have flouted various state bar rules, however.[195] In many cases, these attorneys have not been licensed to practice law in the states where consumers who purchase the MARS reside.[196] In addition, given that attorneys purporting to provide MARS often play little or no role in counseling or negotiating on behalf of borrowers, they may violate state bar requirements that they provide bona fide legal services to their clients.[197] Attorneys also allegedly have engaged in prohibited affiliation arrangements with non-attorneys such as fee-splitting, providing or taking referral fees, and assisting or supporting others in the unauthorized practice of law.[198] In response, state bars have

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[195] *See generally, e.g.*, *Cincinnati Bar Assoc. v. Mullaney*, 119 Ohio St. 3d 412 (2008) (sanctioning attorneys engaged in mortgage assistance relief service for, *inter alia*, engaging in the unauthorized practice of law, fee sharing with nonlawyers, and failing to provide adequate legal services); CRC at 2 ("An increasing number of attorneys are involved themselves in these unethical practices without providing any legal (or other) services, sometimes engaging in fee-splitting or even simply acting as a front for loan modification companies who are seeking to avoid state laws that prohibit some of the practices described above but exempt attorneys.").

[196] *See, e.g.*, CMC at 9-10 ("These attorneys are often not licensed to practice in either the borrower's or servicer's state . . . ."); CSBS at 2 ("This [increase of involvement by attorneys] includes out-of-state attorneys, many of whom are not licensed to practice law in the state where the homeowner lives . . . ."); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2009).

[197] *See, e.g.*, CSBS at 2; Chase at 5; CMC at 9-10; OH AG at 5.

[198] CSBS at 2; California State Bar Ethics Alert at 2 ("Many of the proposed relationships between these foreclosure consultants and lawyers violate the Rules of Professional Conduct and other ethical rules and, therefore, could result in lawyer discipline."); *see also, e.g.*, California Rules of Professional Conduct R. 1-310 (prohibiting partnerships with non-attorneys); *id.* R. 1-310 (prohibiting fee sharing with non-attorneys); *id.* R. 1-300(A) (prohibiting aiding in unauthorized practice of law.).

initiated numerous investigations of attorneys engaged in MARS and, in some cases, have brought misconduct cases against them.[199]

Most of the public comments filed in response to the ANPR that addressed this issue recommended that the Commission not grant a broad exemption for attorneys because of concerns that they may continue to engage in deceptive and unfair practices related to mortgage assistance relief services.[200] NAAG, for example, urged the Commission to provide no exemption for attorneys engaged in MARS.[201]

2. Proposed Exemption

Most comments advocated a narrow exemption limited to certain types of practice or conduct by attorneys.[202] With regard to the prohibition on collecting advance fees, the

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[199] *See, e.g.*, Press Release, State Bar of California, *State Bar Continues Pursuit of Attorney Modification Fraud* (Aug. 12, 2009), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96096*; Florida Bar, *Ethics Alert: Providing Legal Services to Distressed Homeowners*, *available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf?*; *see also, e.g.*, *Cincinnati Bar Assoc. v. Mullaney*, 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services).

[200] *See, e.g.*, IL AG at 1 ("We believe that any rule-making should *not* include a categorical attorney exemption . . . .").

[201] NAAG at 13. One commenter also argued against an exemption for attorneys because it "is likely to create an environment where more companies organize themselves as exempted classes," whereas "[a]n effective rule will not create loopholes that will only be readily exploited, nor will it create unfair competition by creating less-accountable classes of loan modification or foreclosure rescue companies." NCRC at 5.

[202] To the extent that commenters supported any exemption for attorneys, they largely supported a very limited exemption along the lines of the one in the proposed Rule. *See, e.g.*, IL AG at 9 ("We continue to support a limited exemption for attorneys who render legal services on behalf of consumers in the course of serving as the *attorney of record in bankruptcy or foreclosure proceedings*.") (emphasis in original); Shriver at 3 (recommending that "attorneys engaged in judicial foreclosure proceedings should

Commission proposes to exempt only those attorneys who are in compliance with state law, including state bar rules, and only for the provision of specific, limited legal services. Such a narrowly-tailored exemption seeks to strike a balance that would protect consumers from unfair or deceptive conduct by attorneys who are engaged or otherwise involved in the practice of selling MARS, while at the same time preserve the ability of attorneys to provide bona fide legal services to homeowners.

The Commission's limited exemption for attorneys in proposed § 322.7 applies only if the attorney is "providing legal counsel in connection with preparing or filing (i) a bankruptcy petition or any other document that must be filed in a bankruptcy proceeding; or (ii) any document that must be filed in connection with a court or administrative proceeding." The preparation and filing of bankruptcy petitions and other documents for court proceedings is part of the bona fide practice of law. In addition, limiting the attorney exemption in the Rule to these concrete and specific legal services makes it easier for federal and state law enforcement officials to determine whether an attorney in fact qualifies for the exemption. For example, the exemption clearly does not cover attorneys who primarily offer to obtain loan modifications for consumers outside of a formal legal proceeding. Further, the Commission intends for this exemption to cover

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remain exempt at the federal level since they are already regulated [by state law] and supervised [by state bar associations]"); NYC DCA at 4 (recommending that the Commission prohibit collection of advance fees by attorneys "not directly involved with legal services in connection with either the preparation and filing of a bankruptcy petition or court proceedings to avoid a foreclosure."); MA AG at 9 (recommending that the Commission adopt a provision similar to Massachusetts state law, described *infra* note 206).

only attorneys who actually provide the specified legal services for a borrower; it would exclude attorneys that merely market the possibility of doing so.[203]

Moreover, the limited exemption for attorneys from the advance fee ban applies only if the attorney "complies with all applicable state laws, including licensing regulations." If an attorney is not licensed to practice in the state, there is no reason the proposed Rule should not apply to the attorney's activities to the same extent as any other MARS provider. If an attorney is licensed to practice in a state, the attorney would be exempt under the proposed Rule only if he or she complies with state law, including state bar rules. Several commenters advocated the inclusion of such a requirement to protect consumers from unfair and deceptive conduct of attorneys that would violate state ethics and other rules governing attorneys.[204] For example, a frequent characteristic of MARS attorneys engaged in deception is that they offer services to borrowers outside of the state

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[203] In one recent lawsuit by the Commission, the defendants represented to consumers that "they [were] a law firm with attorneys in several states offering loan modification, Chapter 13 bankruptcy, and Chapter 7 bankruptcy." *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009). Despite any such marketing claims, if the attorney associated with a provider fails to work with the borrower to prepare a bankruptcy petition, or instead only seeks a loan modification for the borrower outside of any bankruptcy or other court proceedings, he or she would still be prohibited from requesting or receiving an advance fee under the proposed Rule.

[204] *See, e.g.*, OH AG at 5 (recommending that the exception only apply where the attorney has a legitimate attorney-client relationship with the consumer, which would require the attorney to provide legal services to the consumer and to be properly licensed in the state where he or she would be providing legal services); MA AG at 7-8; NCLC at 15; Chase at 5; CMC at 10; NCLC at 15.

in which they are licensed.[205] Under the proposed Rule, such an attorney would not be exempt from the rule.

Finally, proposed § 322.7 only exempts attorneys from those parts of the proposed Rule that interfere with the attorneys' provision of traditional, bona fide legal services to homeowners. Attorneys would be exempt from the advance fee ban in proposed § 322.7.[206] Attorneys performing the services within the scope of the exemption often collect advance fees in the form of retainers, which usually must be placed in escrow.[207] There is no indication that this practice generally has caused problems for consumers.

The Commission recognizes that this narrow exemption would not apply to attorneys providing MARS to consumers outside of the bankruptcy or litigation context, and therefore might deter some attorneys from providing legitimate assistance to consumers, for example, by calling lenders or servicers on their behalf. There is nothing in the record, however, indicating how many attorneys provide these types of services

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205 *See supra* note 196.

206 Proposed § 322.7 resembles a similar provision in the Massachusetts state mortgage assistance relief rules. The Massachusetts provision provides, in relevant part, "It is an unfair or deceptive act . . . to solicit, arrange, or accept an advance fee in connection with offering, arranging or providing Foreclosure-related Services; provided, however, that [this provision] shall not prohibit a licensed attorney from soliciting, arranging or accepting an advance fee or retainer for legal services in connection with the preparation and filing of a bankruptcy petition, or court proceedings, to avoid a foreclosure. Provided further, however, that a licensed attorney accepting an advance fee or legal retainer must comply with all applicable laws and regulations pertaining to such fees, including the Massachusetts Rules of Professional Conduct . . . ." 940 MASS. CODE REGS. § 25.02.

207 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15 (2009).

and whether an advance fee ban would deter them from helping consumers. In addition to providing a limited exemption from the prohibition on advance fees, proposed § 322.7 exempts lawyers from the proposed Rule's prohibition against instructing consumers to cease communications with their lenders or servicers, so long as the lawyer is licensed to practice law in the state where the consumers resides. The Commission is concerned that the narrowness of the exemption could interfere with the ability of attorneys to offer counsel and advice to their clients. Therefore, it seeks comment on whether this exemption is justified and whether it would be possible to tailor it differently to curb unfair or deceptive acts or practices engaged in by attorneys providing MARS, without preventing or deterring the provision of legitimate legal services.[208]

H. Section 322.8: Waiver

Section 322.8 of the proposed Rule provides that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of the rule." The Commission believes that this provision is necessary to prevent MARS providers from attempting to circumvent the proposed Rule. Several states include similar provisions in their statutes restricting MARS.[209]

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[208] The Commission also seeks comment and data bearing on whether other professionals, such as financial planners, advise consumers on obtaining loan concessions from their lenders or servicers, and whether the proposed Rule would interfere with their provision of MARS. The Commission further requests comment on whether the proposed Rule should contain a limited exemption for these professionals.

[209] *See supra* note 76.

I. Section 322.9: Recordkeeping and Compliance Requirements

Section 322.9(a) of the proposed Rule sets forth specific categories of records MARS providers must retain.[210] A failure to keep such records is an independent violation of the Rule.[211]

Specifically, for a period of 24 months from the date the record is produced, MARS providers must keep the following records:

(1) All contracts or other agreements between the provider and any consumer for any mortgage assistance relief service;

(2) Copies of all written communications between the provider and any consumer occurring prior to the date on which the consumer enters into a contract or other agreement with the provider of any mortgage assistance relief service;

(3) Copies of all documents or telephone recordings created in connection with compliance with paragraph (b) of the section, which sets forth requirements to monitor employees' and independent contractors' compliance with the proposed Rule;

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[210] The proposed recordkeeping requirements are modeled after those set forth in the *TSR Statement of Basis and Purpose*, 60 FR at 43841. As explained below, the required documents include records of transactions with consumers, scripts, advertisements, and related promotional materials. The Telemarketing Sales Act expressly authorized the Commission to impose recordkeeping requirements. Although the Omnibus Appropriation Act, as clarified by the Credit CARD Act, did not give comparable authority to the Commission, the Commission believes that the proposed recordkeeping requirements are reasonably related to the goal of preventing unfair and deceptive conduct.

[211] Proposed § 322.9(c). *See* 16 CFR 310.5(b) ("Failure to keep all records required . . . shall be a violation of [the TSR]."); *TSR Statement of Basis and Purpose*, 60 FR at 43857 ("[I]f a deceptive telemarketer or seller were to destroy records, law enforcement agencies still would be able to charge them with violating § 310.5(b), which makes the failure to maintain all the required records a violation of the Rule.").

(4) All consumer files containing the names, phone numbers, dollar amounts paid, quantity of items or services purchased, and descriptions of items or services purchased, to the extent such information is obtained in the ordinary course of business;

(5) Copies of all materially different sales scripts, training materials, commercial communications, or other marketing materials, including websites and weblogs; and

(6) Copies of the documentation provided to the consumer as specified in § 322.5 of this rule.

The Commission believes the record establishes the need to propose these recordkeeping requirements. As discussed throughout this document, the MARS industry appears to be permeated with deception and unfair practices, targeting financially vulnerable consumers. Accordingly, strong recordkeeping provisions seem essential to ensure effective and efficient enforcement of the Rule and to identify injured consumers.[212]

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[212] NCLC notes that HUD's criteria for approving housing counselors under the HUD Housing Counseling Program include strong recordkeeping provisions. NCLC at 7. These recordkeeping provisions include the retention of client files. *See* Mortgage and Loan Insurance Programs Under the National Housing Act and Other Authorities, 24 CFR 214.315(b) (2007). As HUD explained in its regulation: "The system must permit HUD to easily access all information needed for a performance review." *Id*. at 214.315(a). The recordkeeping requirements proposed by the Commission – focusing largely on documents pertaining to transactions between the provider and client – are similar and will enable the Commission efficiently to obtain evidence of compliance with the proposed Rule. *See TSR Statement of Basis and Purpose*, 60 FR at 43875 ("A record retention requirement is necessary to enable law enforcement agencies to ascertain whether sellers and telemarketers are complying with the requirements of the Final Rule, to identify persons who are involved in any challenged practices, and to identify customers who may have been injured."); *cf.* Franchise Rule, 16 CFR 436.6(h) ("Franchisors shall retain, and make available to the Commission upon request, a sample copy of each materially different version of their disclosure documents for three years after the close of the fiscal year when it was last used."); *id.* at 436.6(i) ("For each completed franchise sale, franchisors shall retain a copy of the signed receipt for at least three years."); Funeral Industry Practices (Funeral Rule), 16 CFR 453.6 (1994) (requiring funeral providers to retain copies of price lists and statements of funeral goods and services for at least one year).

At the same time, the Commission is mindful that recordkeeping provisions impose compliance costs. To reduce the compliance burden, the proposed provisions require that MARS providers generate and keep documents they likely already retain in the ordinary course of their business.[213] In addition, proposed § 322.9(c) states that providers may keep the records in any form and in the same manner, format, or place as they keep records in the ordinary course of business.[214] This flexibility as to the form and manner in which records must be kept likewise would decrease the cost of recordkeeping.

The proposed Rule further attempts to limit the retention requirements to the minimum amount of information necessary. For example, providers must maintain records relating to actual transactions with customers; they are not required to keep records where consumers do not sign contracts or do not agree to offers of mortgage assistance relief services. In addition, providers must retain only materially different versions of advertising and related materials.[215] The proposed Rule calls for a 24-month record retention period.[216] The Commission believes that two years is the minimum amount of time necessary for consumers to report violations of the Rule and for the Commission to complete investigations and to identify victims. Accordingly, the FTC

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213 *Cf. TSR Statement of Basis and Purpose*, 60 FR at 43857 ("The [TSR] Final Rule requires retaining records that most businesses already maintain during the ordinary course of business.").

214 *Cf. id.*

215 *Cf. id.* at 43858 (recognizing the burden imposed by requiring the retention of each and every script, advertisement, and promotional piece, "much of which may be worthless or redundant from a law enforcement standpoint").

216 *Cf.* 16 CFR 310.5(a) (setting forth a 24-month record retention requirement).

believes that the proposed recordkeeping provisions strike an appropriate balance between ensuring efficient and effective law enforcement and avoiding the imposition of unnecessary compliance costs.

Section 322.9(b) of the proposed Rule also contains four compliance requirements reasonably calculated to prevent unfair or deceptive practices by MARS providers. Proposed § 322.9(b)(1) requires providers to monitor the Rule compliance of their employees and independent contractors. Such steps include monitoring sales presentations with customers and potential customers. Providers specifically must:

- Conduct random, blind tape recording of the oral representations made by persons in sales or other customer service functions;[217]
- Establish a procedure for receiving and responding to consumer complaints; and
- Ascertain the number and nature of consumer complaints regarding transactions with the employee or independent contractor.

Proposed § 322.9(b)(2) also requires that MARS providers investigate promptly and fully any consumer complaint received. To comply with this provision, MARS providers should establish a procedure for receiving, investigating, and responding to all consumer complaints. Proposed § 322.9(b)(3), in addition, mandates that MARS providers must take corrective action with respect to any salesperson whom the provider determines is not complying with the Rule. These corrective actions include the adoption and implementation of a reasonable program to train, discipline and terminate employees

[217] The Commission notes that this requirement does not mean that MARS providers must tape every sales call; rather, implementing a taping program that is reasonably designed to record calls on a random basis without knowledge that the calls are being recorded would suffice.

who do not comply with the Rule. Finally, proposed § 322.9(b)(4) requires documentation of compliance with the above requirements. Such documentation must include copies of the random, blind tape recordings of employees' communications with consumers and records of any disciplinary actions against employees for non-compliance with the Rule.

The compliance requirements in the proposed Rule are comparable to provisions in other FTC rules, including the Standards for Safeguarding Customer Information ("Safeguards Rule"),[218] TSR,[219] and the 900 Number Rule.[220] In the TSR and 900 Number Rules, the Commission imposed monitoring and compliance requirements parallel to those set forth in proposed § 322.9(b). As is the case with the Safeguards Rule, proposed § 322.9(b)(3) of the proposed Rule requires that covered entities take appropriate corrective actions to ensure employee and contractor compliance with the Rule.[221] In addition, proposed § 322.9(b)(1)'s specification that monitoring must include, at a minimum, random, blind taping recording and monitoring of the oral representations made by sales representatives has a parallel in the TSR.[222] The requirement in proposed

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[218] 16 CFR 314.1, *et seq*. (2002) (imposes various affirmative obligations on covered entities in connection with implementing mandated security program to protect and secure customer information); *see also* Children's Online Privacy Protection Rule, 16 CFR 312.1, *et seq*. (2005) (requiring, among other things, parental approval to collect personal information from children).

[219] 16 CFR 310.1, *et seq*.

[220] 16 CFR 308.1, *et seq*.

[221] 16 CFR 314.4; *see also* 900 Rule, 16 CFR 308.3(h).

[222] *See* 16 CFR 310.4(a)(6)(i)(C) (requiring telemarketers to make and maintain an audio recording of telemarketing transactions involving pre-acquired account information).

§ 322.9(b) that MARS providers receive, respond to, and investigate consumer complaints is comparable to the billing and collection provisions in the 900 Rule that require consumer dispute resolution procedures, including responding to customer allegations of billing errors.[223]

J. Section 322.10: Actions by States

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits states to enforce the Rules issued in connection with the MARS rulemaking.[224] States may enforce the Rules, subject to the notice requirements of the Omnibus Appropriations Act, by bringing civil actions in federal district court or another court of competent jurisdiction. Proposed § 322.10 sets forth that states have the authority to file actions against those who violate the Rule.

K. Section 322.11: Severability

Proposed § 322.11 states that the provisions of the Rule are separate and severable from one another. This provision, which is modeled after a similar provision in the TSR,[225] also states that if a court stays or invalidates any provisions in the proposed Rule, the Commission intends the remaining provisions to continue in effect.

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223 *See* 16 CFR 308.7. Specifically, the 900 Rule requires billers of pay-per-call services to respond to consumer notices of billing errors, including: (1) sending a written acknowledgment to the consumer of receipt of the billing error notice; (2) correcting the billing error and crediting the consumer's account for any disputed amount; and (3) if appropriate, explaining to the customer, after reasonable investigation, the reasons why no billing error occurred.

224 Credit CARD Act § 511(b).

225 *See* 16 CFR 310.9.

IV. Request for Comment

The Commission seeks comment on various aspects of the proposed Rule. Without limiting the scope of issues on which it seeks comments, the Commission is particularly interested in receiving comments on the questions that follow. In responding to these questions, please include detailed factual supporting information whenever possible.

A. General Questions for Comment

Please provide comment on each aspect of the proposed Rule, including answers to the following questions.

(1) How would the proposed Rule affect the provision of different types of mortgage assistance relief services? Useful information would include information about the services provided by particular entities or the types of entities, how these different entities perform their services, and the effect of the proposed Rule on them.

(a) In particular, what types of mortgage and foreclosure relief are being offered to consumers? Do the forms of relief differ in the benefits they provide to consumers and, if so, how do they differ? Do the costs of mortgage assistance relief services vary based on the type of relief offered and, if so, how? For each form of relief, what is the likelihood consumers will receive it? What factors affect whether a particular consumer will receive a form of relief?

(b) Do entities differ in how they currently charge fees for their services? For example, what payments are made before work begins, what payments are made while work is being performed, and what payments are made after all work is completed? Which types of providers require consumers to make some payment before services are

completed, and which do not? How much of the total fee do providers typically collect prior to completing their work? Are consumers required to make payments that are contingent on the provider achieving a beneficial result and, if so, how much of the total amount paid is contingent on such a result? Which types of providers require consumers to pay only if the providers achieve a beneficial result? How is it determined that the provider has achieved such a beneficial result?

(2) What would be the effect of the proposed Rule (including any benefits and costs) on consumers? Would the costs and benefits to consumers differ depending on the service offered or the type of provider offering it and, if so, how? Would the costs and benefits differ depending on the form of relief and, if so, how?

(3) What evidence is there that consumers are misled in the promotion and sale of MARS? Are consumers misled by particular types of entities and, if so, which ones? What evidence is there that consumers are misled about the status of MARS providers or their affiliation with the government, government programs, lenders, or servicers? What evidence is there that consumers are misled about the likelihood that they will receive specific results and, if so, which results? What evidence is there that consumers are misled about the total cost of MARS? About what other attributes of MARS do providers mislead consumers?

(4) What would be the effect of the proposed Rule (including any benefits and costs) on MARS providers?

(5) Would the proposed Rule encourage or discourage financial advisors, financial planners, and other providers of financial services from becoming MARS providers or adding MARS to their existing lines of business? Does the proposed Rule

restrict business practices, for example, the terms of payment, that create barriers for financial service providers from becoming MARS providers? If so, what are these business practices and how does the proposed Rule affect them?

(6) What changes, if any, should be made to the proposed Rule to increase benefits to consumers and competition?

(7) What changes, if any, should be made to the proposed Rule to decrease costs to industry or consumers?

(8) How would the proposed Rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

B. Specific Questions on Proposed Provisions

1. Section 322.2: Definitions

(1) Does the definition of "mortgage assistance relief service" in proposed § 322.2(h) adequately describe the scope of the proposed Rule's coverage? If not, how should it be modified? Are there additional services or forms of relief that should be included in the definition? Alternatively, are there services or forms of relief that should not be included in the definition? Should additional terms be defined and, if so, how? What would be the costs and benefits of each suggested definition?

(a) In particular, should the proposed Rule cover services to assist consumers negotiate with their lenders to obtain new loans or refinancing? What types of entities offer these kind of services? What factors affect whether a particular consumer receives this form of relief? Do entities offer these services to consumers who may be delinquent on their mortgages, owe more on their mortgages than their homes are worth, or who are struggling to make their mortgage payments? What is the likelihood that consumers in

these situations receive refinancing or new loans? What evidence, if any, is there that consumers in these situations are being misled about these services? Are other laws or regulations sufficient to protect consumers from these practices? What would be the costs and benefits of including these types of services in the proposed Rule?

(b) The Commission intends the proposed Rule to apply to sale-leaseback and similar transactions *only* to the extent that such transactions are marketed as a means to avoid foreclosure. What are the costs and benefits of this approach? Should these services generally be exempted from coverage? Alternatively, should these services be subject to additional restrictions and limitations in the proposed Rule? What is the experience of the states in regulating these types of transactions? Does the proposed Rule conflict with state laws regulating sale-leaseback and similar transactions and, if so, how should the conflict be resolved?

(c) Are there reasons to broaden the definition of MARS to include the word "product?" Would the addition of "products" allow the proposed Rule to address deceptive and unfair practices not already covered? Are there reasons to include "products" in anticipation of likely changes in the marketplace? Why or why not?

(2) Should any entities covered by the definition of "mortgage assistance relief service provider" in proposed § 322.2(i) be excluded or exempted from this definition? If so, which entities? Why or why not?

(a) In particular, should MARS provider be defined for the purposes of the proposed Rule to exclude persons who provide incidental or de minimis advice or assistance? If so, how should incidental or de minimis advice or assistance be measured? Should this modified definition depend on whether the person attempts to obtain the

mortgage relief on behalf of the consumer, or advises or assists the consumer to obtain the relief on his or her own?

(3) Proposed §§ 322.2(i)(1) and (2) generally exempt loan holders and servicers, as well as their agents, from the definition of "mortgage assistance relief service providers." Is this exemption appropriate? Why or why not? Do these entities promote or sell MARS to consumers? If so, what types of services are offered to consumers and how are fees collected for these services? Are there concerns that loan holders and servicers engage in deceptive or unfair conduct addressed by the proposed Rule? If so, please provide a detailed explanation.

(4) Proposed § 322.2(i)(3) generally exempts from the definition of "mortgage assistance relief service providers" any nonprofit excluded from the FTC's jurisdiction. What types of such nonprofit entities offer MARS? What types of MARS do these entities offer to consumers and, if applicable, how are fees collected for these services? What are the costs and benefits for consumers if MARS are provided by a nonprofit rather than a for-profit entity? Does the proposed Rule create an incentive for for-profit entities to become nonprofits? If providers become nonprofits, what would be the advantages and disadvantages for consumers?

(5) Are the disclosure standards set forth in the definition of "clear and prominent" appropriate for MARS? What are the costs and benefits of these standards? For example, is it appropriate for the visual disclosure to be at least 4 percent of the vertical picture or screen height and be shown for at least the duration of the oral disclosure? Should these disclosures be larger or longer? Do consumers notice and comprehend disclosures that appear on a separate landing page immediately prior to the

page on which the consumer takes action to incur any financial obligation? Are there alternative standards that would be more effective? Are there data bearing on whether the proposed disclosure standards would be effective?

2. Section 322.3: Prohibited Representation

(1) Proposed § 322.3(a) bans providers from advising consumers not to contact or communicate with their lenders or servicers. What are the costs and benefits of banning these types of statements? Should additional statements relating to MARS be prohibited? Are there alternative approaches to banning such advice that would allow such advice to be given but would still protect consumers from the risk arising from not communicating with servicers or lenders?

(2) Proposed § 322.3(b) prohibits misrepresentations of any material aspect of any MARS, and provides specific examples of such prohibited misrepresentations. How widespread is each specified misrepresentation? Are there other prohibited misrepresentations that should be specified in the proposed Rule? If so, why? Should any of the described misrepresentations be broadened or narrowed to better address the deceptive conduct they are intended to prevent? If so, what should those modifications be?

3. Section 322.4: Required Disclosures

(1) Are the disclosures required by proposed § 322.4 appropriate to address current and prospective harms to consumers in connection with the sale of MARS? Why or why not? How could the disclosures be modified to better address these harms? Is the proposed language of each disclosure readily understandable by consumers? If not, is

there alternative language that would be more effective? If so, provide the suggested disclosure language and discuss why it would be more effective.

(2) The disclosure required under § 322.4(b)(3) only must be made in cases where MARS are represented to perform services and achieve results that are set forth in § 322.2(h)(1) and §§ 322.2(h)(3)-(6). Are there other situations in which the disclosure requirements should be tailored to apply only to entities purporting to provide certain services or results, or should each of the disclosure requirements be applicable to all MARS providers? Why or why not? If so, which entities should be covered for each required disclosure?

(3) What are the costs and benefits of the disclosure requirements in the proposed Rule? How would MARS providers comply with the requirements? What burdens do the requirements impose on providers? Are there changes that could be made to lessen the burdens without reducing the benefits to consumers?

(a) In particular, would having the proposed Rule mandate a specific format for disclosures or set forth a disclosure requirement that would be a safe harbor lessen the burdens on MARS providers without reducing the benefits to consumers?

(b) Should the proposed Rule mandate that the required disclosures be made in writing? If so, how should such disclosures be made, for example, in a contract or a stand-alone notice? If there is a written notice, what types of information should be included in the notice? For example, should the written notice disclose the total fee for the MARS and/or any formula used to calculate the amount of the fee charged for the service? When should the written disclosures be made to consumers? What would be the

added benefits to consumers of such a disclosure requirement? What would be the added costs to MARS providers?

(4) Are there additional types of information that should be disclosed to prevent harm to consumers? If so, please identify the types of information, and, if possible, provide suggested language that could be used to convey that information to consumers. Also, please discuss the relative costs and benefits to consumers and industry of such disclosures? For example, would it be beneficial for MARS providers to disclose to consumers the consequences of not paying their mortgages (such as the loss of their home and damage to their credit ratings)? Why or why not? If the proposed ban on advance fees is enacted, would it be beneficial for MARS providers to disclose to consumers that fees are not owed unless promised results are delivered? Why or why not? Should MARS providers be required to disclose the minimum specific benefit the consumer will receive, *e.g.*, the minimum reduction in the monthly payment amount, for the amount of fees to be paid? Would such a disclosure be beneficial to consumers or competition? Why or why not?

(5) Should the FTC require MARS providers to disclose their historical performance? If so, how should historical performance be measured and disclosed? Could historical performance information mislead some consumers about the likelihood that they will achieve the promised results? How do the potential benefits of such a disclosure compare to the potential costs? If the FTC requires this disclosure, what if any disclosure should be required of new entrants?

4. Section 322.5: Prohibition on Collection of Advance Payments

(1) Proposed § 322.5 specifically prohibits the collection of any fee or other consideration for MARS until after the provider has achieved all of the results the provider represented, expressly or by implication, to the consumer that the service would achieve, and that is consistent with consumers' reasonable expectations about the service. Should MARS providers be required to achieve these results to receive payment? Why or why not? Would an alternative standard for receiving payment be more appropriate? If so, describe the alternative standard and discuss its relative costs and benefits.

(a) In particular, the Notice of Proposed Rulemaking to amend the Telemarketing Sales Rule to address the sale of debt relief services, 74 FR 41988 (Aug. 19, 2009) prohibits:

> Requesting or receiving payment of any fee or consideration from a person for any debt relief service until the seller has provided the customer with documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.

Should the standard be the same as or different than the standard articulated for debt relief services in the proposed amendments to the TSR?

(b) Would it be appropriate for the Commission to consider allowing providers to collect a limited initial fee or set-up fee at the beginning of MARS being provided? Would this provide sufficient protection for consumers? Why or why not? Do providers currently use this payment model in the MARS industry and, if so, how much do they collect upfront from consumers and in total? For what purposes do providers use such fees? What has been the experience of states that have limited the amount of the initial

fee or set-up fee providers may charge consumers? If providers were permitted to collect an initial or set-up fee, what fees should be limited and what amount should be permitted? (c) Should MARS providers who promise that consumers will obtain a specific end result (*e.g.*, a successful loan modification) be allowed to charge partial or piecemeal fees for intermediate results (*e.g.*, helping the consumer fill out required forms to apply for the loan modification)? Why or why not? Would allowing providers to charge fees for intermediate services provide an opportunity for fraudulent providers to charge consumers without ever obtaining the result consumers expect, such as a loan modification, and thus evade the advance fee ban?

(d) Should MARS providers be allowed to charge fees for individual services (*e.g.*, helping consumers fill out required forms) so long as they do not promise that consumers will obtain a specific end result (*e.g.*, a successful loan modification)? Why or why not? If MARS providers are allowed to collect such fees in this situation, should they be required to disclose that they are not promising to deliver a specific, or any, end result? Would such a disclosure be sufficient to avoid consumer deception?

(e) What are the costs and benefits of providers charging fees based on the level of the benefit provided? For example, what is the effect if MARS providers charge fees that are proportional to the size of the loan modification ultimately obtained for the consumer? If MARS providers charge such fees for loan modifications, should a minimum level of benefit be required? If a minimum level of benefit is required, should the minimum level be a substantial and permanent reduction in the amount of the scheduled mortgage payments, or something else? Should providers be required to charge fees based on the level of the benefit provided? Why or why not?

(2) In certain cases, proposed § 322.5 specifies that a MARS provider cannot request or receive payment until after it delivers a "mortgage loan modification" to the consumer. Mortgage loan modification is defined as a "the contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments." Under the proposed Rule, such change must be "permanent for a period of five years or more;" or "will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less." Is this the appropriate standard to ensure that providers confer on consumers the benefit they expect? Why or why not? Are there alternative standards that should be applied? If so, describe the suggested standard and explain the relative costs and benefits of the standard.

(a) Does the definition of "mortgage loan modification" define the conditions for payment clearly enough? Why or why not? In particular, does the term "substantially" need to be defined and, if so, what would constitute a substantial reduction for the consumer? Similarly, should the term "permanent" be modified to ensure that consumers receive a benefit consistent with reasonable expectations? If so, describe the suggested modifications and discuss the relative costs and benefits of each modification.

(3) What benefits do consumers paying fees in advance of performance provide to consumers or competition? What evidence is there that consumers who purchase MARS fail to pay the fees if fees are not collected in advance? What evidence is there that without collecting fees in advance providers could not fund their operations? Will it no longer be economically feasible for covered entities to provide particular types of

services if this fee restriction is imposed? Which services will it be no longer economically feasible to provide and why?

(4) Would it be appropriate to allow providers to use escrow accounts to collect their fees upfront? What are the costs and benefits of using escrow accounts?

(a) To what extent do providers of MARS currently use escrow accounts? If so, how are these escrows structured, for example, what conditions must be met before providers are entitled to withdraw money from the escrows? Have providers abused escrow accounts, for example, by making unauthorized withdrawals or refusing to return money to consumers when services are not performed? What has been the experience in states that allow escrows for MARS? What has been the experience of the states with respect to these escrows, for example, have the states observed abuses and, if so, what? Are there types of escrows used for other services that providers of MARS could use that would provide sufficient protection for consumers? Why or why not?

(b) If escrows are allowed in connection with consumers paying fees to MARS providers, how should the escrows be structured? What restrictions and limitations are needed to protect consumers, for example, should any funds held in escrow be returned automatically to consumers if services are not completed within a certain time period? What type of accounting and reporting should be required for escrow accounts, if any? Are there entities that could provide escrow services in connection with MARS and, if so, which types of entities? Is there a way to determine whether a provider of escrow services is more likely to perform its duties adequately, for example, are there applicable licensing requirements?

(5) To what extent does the proposed Rule's advance fee ban (§ 322.5) prevent harm to consumers that would not be eliminated by its prohibition against misrepresentations (§ 322.3) and the disclosure requirements (§ 322.4)? If you believe that proposed § 322.5 does not provide any additional protection, please explain why.

(6) Should any type or portion of fees charged by entities offering MARS be exempted from proposed § 322.5? If so, which fees, either by type of entity providing the service or by type of fee, should be exempted, and why?

(7) Should consumers have the right to rescind any agreement to purchase MARS within a certain time period? Should a right of rescission be a substitute for, or complement to, the advance fee ban? Why or why not? If the proposed Rule contained a right of rescission, how long should consumers have to rescind their contracts? What are the relative costs and benefits of giving consumers the right to rescind the contract?

(8) Proposed § 322.5 prohibits the collection of any fee or other consideration until after the MARS provider provides the consumer with documentation of achieved results. What type of documentation should be required, for example, should the provider be required to produce a copy of a written contract between the lender or servicer and the consumer setting forth the specific concession? In the case of "mortgage loan modifications," proposed § 322.5 requires that the provider produce a "contractual agreement between the dwelling loan holder or servicer and the consumer." For a mortgage loan modification, is this the appropriate form of documentary proof, or are there alternatives? Describe each suggested alternative and discuss its relative costs and benefits.

5. Section 322.6: Assisting and Facilitating

(1) Is proposed § 322.6 the appropriate standard to address assisting and facilitating in connection with the sale of MARS? Why or why not? What types of entities provide substantial assistance or support to MARS providers? What evidence is there that these entities know or consciously avoid knowing that MARS providers are violating the proposed Rule? What would be the costs to these entities of determining whether MARS providers are in compliance with the proposed Rule? What effect would these costs have on those who assist the operation of MARS providers?

6. Section 322.7: Exemptions

(1) Proposed § 322.7 exempts attorneys from proposed § 322.3(a)'s ban on instructing consumers not to communicate with their lenders or servicers, so long as the attorneys are licensed to practice in the state where the consumer resides. Is this exemption appropriate? Why or why not? What are the costs and benefits of allowing attorneys to make these types of statements? Are there other types of entities that should be exempted from this provision? If so, identify which entities and explain why.

(2) Proposed § 322.7 exempts an attorney from the advance fee ban if the attorney: (a) provides MARS in connection with a bankruptcy petition or other court proceeding; (b)) is licensed to practice in the state where the consumer resides; and (c) is in compliance with applicable state laws, including licensing regulations. Is this exemption appropriate? Why or why not? Should the exemption be broader to cover other legal services attorneys provide? If so, describe other services and discuss the costs and benefits of exempting them from the advance fee ban. What is the experience of states with laws governing MARS that exempt attorneys?

(3) What types of MARS services apart from representation in litigation (*e.g*, calling lenders or servicers on consumers' behalf) do attorneys perform that would not qualify for the exemption in proposed § 322.7? How prevalent is the provision of these non-litigation legal services, and how do they provide consumers with legitimate mortgage relief? If such services are provided, what types and amounts of fees do these providers charge, and how are these fees collected? Are trust or escrow accounts used to hold these fees while services are being performed? Does the proposed advance fee ban unduly restrict the provision of these non-litigation legal services? If so, are there any alternatives to the proposed advance fee ban, such as escrows accounts, that will adequately protect consumers from unfair and deceptive practices, while allowing attorneys to continue to provide such bona fide legal services to consumers?

(4) Are there entities other than attorneys that should be exempt from the advance fee ban and, if so, which entities? What types of MARS services do these entities perform? For example, do financial planners or advisors provide MARS services and, if so, what types of services do they perform? How prevalent is the provision of MARS services by any such non-attorney entities? What types and amount of fees do these non-attorney entities charge? How would the advance fee ban affect the provision of these types of services to consumers? If an exemption is appropriate, please describe in detail the entities and services that should be covered by the exemption and how the exemption should be structured?

7. Section 322.9: Recordkeeping and compliance requirements

(1) Proposed § 322.9 requires a 24-month document retention period. Is this period of time adequate for effective and efficient law enforcement? Does it impose

unnecessary costs on MARS providers? Should the Commission consider an alternative document retention period, for example, a time period commensurate with the five-year statute of limitations for an FTC action for civil penalties? If so, explain what you believe to be the appropriate time period, and why?

(2) Proposed § 322.9(b)(1) sets forth steps MARS providers must take to monitor and ensure that all their employees and independent contractors comply with the proposed Rule. For example, the proposed Rule requires MARS providers to perform random, blind, taping and testing of telemarketer presentations, to establish a procedure for receiving and responding to consumer complaints, and to determine the number and nature of consumer complaints regarding employees and independent contractors. Are these monitoring requirements sufficient to ensure compliance with the Rule? Should the Commission consider alternative monitoring provisions? What would be the costs and benefits of such alternatives?

(3) Proposed § 322.9(b)(4) mandates that MARS providers maintain documentation of their compliance with §§ 322.9(b)(1)-(3) of the Rule. Should the retention period for these documents be a 24-month period or an alternative period of time? For example, would a time period commensurate with the five-year statute of limitations for an FTC action for civil penalties be more appropriate? For each suggested time period, discuss why you believe it would be appropriate.

(4) Proposed § 322.9(c) permits MARS providers to retain documents in any form and in the same manner, format, or place as they keep such records in the ordinary course of business. Is this flexibility warranted in the context of MARS? Should the

Commission specify how documents should be retained? If so, explain what you believe to be the appropriate standard for retaining documents.

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Mortgage Assistance Relief Services Rulemaking, Rule No. R911003" to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at *http://www.ftc.gov/os/publiccomments.shtm*.

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential . . . . ," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[226]

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[226] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* 16 CFR 4.9(c).

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted at *http://public.commentworks.com/ftc/MARS-NPRM* and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at *http://public.commentworks.com/ftc/MARS-NPRM*. If this Notice appears at *http://www.regulations.gov/search/Regs/home.html#home*, you may also file an electronic comment through that website. The Commission will consider all comments forwarded to it by regulations.gov. You may also visit the FTC website at *www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the reference "Mortgage Assistance Relief Services Rulemaking, Rule No. R911003" both in the text of the comment and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex W), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington, DC area and at the Commission is subject to delay due to heightened security precautions.

Comments on any proposed filing, recordkeeping, or disclosure requirements that are subject to the paperwork burden review under the Paperwork Reduction Act should additionally be submitted to: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for Federal Trade

Commission. Comments should be submitted via facsimile to (202) 395-5167 because U.S. postal mail at the OMB is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at *http://www.ftc.gov/os/publiccomments.htm*. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.shtm*.

V. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner's advisor will be placed on the public record.[227]

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA)[228] requires the Commission to provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed Rule, and a Final Regulatory Flexibility Analysis (FRFA) with a final rule, unless the Commission

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227 *See* 16 CFR 1.26(b)(5).

228 5 U.S.C. 601-612.

certifies that the rule will have no significant economic impact on a substantial number of small entities.[229]

The Commission anticipates that the proposed MARS Rule will have no significant economic impact on a substantial number of small entities. As noted above, the proposed Rule will prevent unfair and deceptive conduct by MARS providers through a combination of conduct prohibitions, disclosures, affirmative compliance obligations, and recordkeeping provisions. As discussed in detail in the ANPR, the proposed Rule's reach is limited. First, the proposed Rule will cover entities that are within the FTC's jurisdiction under the FTC Act. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction. Further, the proposed definition of "mortgage assistance relief service provider" is limited to third parties offering for-fee services and does not extend to free services provided by lenders or mortgage servicers and their agents. In addition, the proposed Rule would provide attorneys with a limited exemption from the advance fee ban, as well as with a broad exemption from its prohibition against directing consumers not to contact their lender or servicer.

As detailed below, the Commission believes that the proposed Rule is likely to cover several hundred MARS providers. Although the Commission does not know the

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[229] 5 U.S.C. 603-605. Covered entities under the proposed Rule will be classified as small businesses if they satisfy the Small Business Administrator's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (NAICS). Because a wide range of individuals and companies may provide mortgage assistance relief services to homeowners, no one classification is applicable to this rulemaking. The closest NAICS size standards relevant to this rulemaking is $7-8.5 million maximum in annual receipts. That is the range in size standard for comparable professional and support services, such as those for lawyers ($7 million), tax preparation services ($7 million), certified public accountants ($8.5 million), human resources consulting services ($7 million), and marketing consulting services ($7 million).

precise number of such providers, its conservative estimate is that the Rule will cover approximately 500 providers. It is not known, however, how many of those 500 providers, if any, are small entities. The Commission nonetheless believes that the number of providers that are small entities is not likely to be substantial and, therefore, the proposed Rule is not likely to have a significant economic impact on a substantial number of small entities. Accordingly, this document serves as notice to the Small Business Administration of the Commission's certification of no economic impact. Nonetheless, the FTC has determined to prepare the following analysis:

A. Description of the Reasons That Action by the Agency is Being Considered

The Commission proposes, and seeks comment on, a rule to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which mandates that the Commission initiate a rulemaking with respect to mortgage loans. Section 511 of the Credit CARD Act clarified that the Commission's rulemaking should relate to unfair or deceptive acts or practices, and stated that the FTC's implementing rules should address "loan modification and foreclosure rescue services." In addition, the proposed Rule will cover those entities over which the FTC has jurisdiction under the FTC Act – entities other than banks, thrifts, federal credit unions, and nonprofits that engage in the conduct the rule would cover. Through this document, the Commission proposes, and seeks comment on, prohibitions, disclosures, affirmative compliance requirements, and recordkeeping provisions aimed at for-profit MARS providers to prevent deceptive and unfair practices that harm borrowers, consistent with the goals of the Act.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The proposed Rule is intended to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which directs the Commission to initiate a rulemaking with respect to mortgage loans. As noted above, the Omnibus Act, as amended, directs the Commission to initiate a rulemaking related to unfair or deceptive acts or practices with respect to mortgage loans. Through the rulemaking, the Commission seeks to prevent deceptive and unfair acts and practices in the mortgage assistance relief services industry, which has been the subject of numerous individual law enforcement actions under Section 5 of the FTC Act.

C. Small Entities to Which the Proposed Rule Will Apply

The proposed Rule will apply to mortgage assistance relief service providers. Based upon its knowledge of the industry, the Commission believes that a variety of individuals and companies provide or purport to provide such services, including telemarketers, mortgage brokers, lead generators, payment processors, contractors that provide back-room services, and attorneys.

Comments in response to the ANPR suggest that the number of MARS providers purporting to assist distressed homeowners is growing in response to the crisis in the home mortgage industry,[230] but do not offer empirical data on the number of such entities.[231] The available data suggest that there are a few hundred such providers. For

[230] *See, e.g.*, MA AG at 1-2; NAAG at 3-4; OH AG at 1.

[231] For example, NAAG explained that it is difficult to obtain empirical data on providers "due to the prominence of internet-based companies and their ephemeral nature. The difficulty of gathering information is increased due to the fact many of these companies operate primarily over the internet and do not maintain a physical presence in the states in which they do business." NAAG at 3.

example, FTC staff sent warning letters to 71 MARS providers in the course of its investigation of the industry. In its comment, the National Community Reinvestment Coalition reported testing of 100 MARS providers. NAAG stated that its members have investigated 450 companies and brought suits against 130 under state law.[232] Accordingly, Commission staff has taken a conservative approach and estimates that there are approximately 500 mortgage assistance relief service providers. Nonetheless, staff cannot readily estimate the number of such providers, if any, that are small entities. Accordingly, the Commission specifically requests additional comment on: (1) the number of individuals or entities that provide mortgage assistance relief services; and (2) the number of such providers, if any, that are small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed Rule sets forth specific recordkeeping requirements to ensure efficient and effective law enforcement, to identify individual wrongdoers, and to identify potential injured consumers. In large measure, the recordkeeping provisions require MARS providers to retain documents – consumer files and documentation of consumer transactions – that are kept in the ordinary course of business. Other proposed recordkeeping requirements would ensure covered entities can demonstrate compliance with specific proposed Rule provisions, which are discussed below.

The proposed Rule has three other kinds of compliance requirements: (1) prohibited acts and practices that are deceptive or unfair; (2) disclosures to ensure that consumers receive the truthful and accurate information they need to make an informed

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[232] NAAG at 4.

decision whether to purchase MARS; and (3) compliance obligations to monitor sales promotions and consumer complaints. As discussed above, these requirements are necessary to prevent unfair or deceptive acts and practices, to ensure compliance with the Rule, and to achieve effective law enforcement.

The classes of small entities, if any, covered by the rule have been discussed in the preceding section of this analysis.[233] The professional or other skills necessary for compliance with the proposed Rule are discussed in the Paperwork Reduction Act analysis elsewhere in this document.[234]

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed Rule. The Commission invites comment on this issue.

F. Significant Alternatives to the Proposed Rule Amendments

As previously noted, the proposed Rule is intended to prevent deceptive and unfair acts and practices in the mortgage assistance relief services industry, as mandated by the Act. The proposed Rule is intended to achieve that goal without creating unnecessary compliance costs. To achieve that goal, the Commission proposes a definition of "mortgage assistance relief service provider" that focuses on for-fee third-party providers. The term does not include the mortgage loan holder or servicer of a mortgage, or any agent of either, provided that the agent does not receive any money or

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233 *See supra* § VI.C.

234 *See infra* § VII.

other valuable consideration from the borrower for the agent's own benefit.[235] Further, as discussed in Section III.I above, providers generally must keep only consumer files and consumer transactional records that are retained in the ordinary course of business. In addition, proposed § 322.9(c) states that providers may keep the records in any form and in the same manner, format, or place as they keep records in the ordinary course of business.

The proposed Rule also limits the type of information that must be retained to a minimum. For example, providers must maintain records relating to actual transactions with customers; they are not required to keep records if consumers do not sign contracts or otherwise agree to an offer of mortgage assistance relief services. In addition, providers must retain only materially different versions of advertising and related materials.[236] Finally, the proposed Rule calls for a 24-month record retention period. The Commission believes this is the minimum amount of time necessary for consumers to report violations of the Rule and for the Commission to complete investigations of noncompliance and to identify victims.

Furthermore, the recordkeeping and disclosure requirements are format-neutral; they would not preclude the use of electronic methods that might reduce compliance burdens. In addition, the Commission is not aware of any feasible or appropriate

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[235] *See* ABA at 8; AFSA at 1, 3; Chase at 1; CMC at 1; MBA at 3-4 (urging the Commission not to cover mortgage servicers or third parties retained by mortgage servicers to assist homeowners on a not-for-profit basis).

[236] *See TSR Statement of Basis and Purpose*, 60 FR at 43858 (recognizing the burden imposed by requiring the retention of each and every script, advertisement, and promotional piece, "much of which may be worthless or redundant from a law enforcement standpoint.").

exemptions for small entities because the proposed Rule attempts to minimize compliance burdens for all entities.

Nonetheless, the Commission seeks additional comment regarding: (1) the existence of small entities for which the proposed Rule would have a significant economic impact and (2) suggested alternatives, including potential exemptions for small entities, that would reduce the economic impact of the proposed Rule on such small entities. If the comments filed in response to this document identify any small entities that would be significantly affected by the proposed Rule, as well as alternatives that would reduce compliance costs on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into any final Rule.

VII. Paperwork Reduction Act

The Commission is submitting this proposed Rule and a Supporting Statement to the Office of Management and Budget for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-21. The disclosure and recordkeeping requirements of the proposed Rule constitute "collection[s] of information" for purposes of the PRA.[237] The associated PRA burden analysis follows.

A. Disclosure Requirements

As discussed in the preamble, the proposed Rule requires several disclosures that MARS providers must place in commercial communications for MARS and must state to specific consumers who seek such services. In commercial communications, providers

[237] *See* 44 U.S.C. 3502(3)(A).

must include the following statement: "IMPORTANT NOTICE: (Name of company) is a for-profit business not associated with the government. This offer has not been approved by the government or your lender."

In addition, providers must disclose to consumers, in any advertisement or other commercial communication directed to a specific consumer, the cost of those services and the following statements: (1) that "(Name of company) is a for-profit business not associated with the government;" (2) that the "offer has not been approved by the government or your lender"; and, in some instances; (3) "Even if you buy our service, your lender may not agree to change your loan."[238]

B. Recordkeeping Requirements

The proposed Rule also imposes several recordkeeping requirements. Several record retention requirements, however, pertain to records that are customarily kept in the ordinary course of business, such as copies of contracts and consumer files containing the name and address of the borrower, and materially different versions of sales scripts and related promotional materials. As such, the retention of these documents does not constitute a "collection of information," as defined by OMB's regulations that implement the PRA.[239]

In other instances, the proposed Rule requires MARS providers to create as well as retain documents demonstrating their compliance with specific Rule requirements. These include the requirement that providers document the following activities: (1) the

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[238] Proposed § 322.4 sets forth the format and content of the notice, which varies depending upon the medium used.

[239] *See* 5 CFR 1320.3(b)(2).

performance of promised services and delivery of promised services before seeking payment from a borrower; (2) monitoring of sales presentations by tape recording and testing of oral representations; (3) establishing a procedure for receiving and responding to consumer complaints; (4) ascertaining, in some instances, the number and nature of consumer complaints; and (5) taking corrective action if sales persons fail to comply with the proposed Rule, including training and disciplining sales persons.

C. Estimated Hours Burden and Associated Labor Costs

Commission staff believes that the above noted disclosure and recordkeeping requirements will impact approximately 500 MARS providers. The related PRA burden assumptions and calculations follow.

(1) Disclosure Requirements

The proposed Rule calls for the disclosure of specific items of information to consumers. Largely, the content of the disclosures is prescribed. Thus, the PRA burden on providers is greatly reduced.[240] Staff conservatively estimates, however, that the incremental burden to prepare these documents will be approximately 2 hours. Staff assumes that management personnel will implement the disclosure requirements, at an hourly rate of $45.22.[241] Based upon these estimates and assumptions, total labor cost for

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[240] According to OMB, the public disclosure of information originally supplied by the Federal government to a recipient for the purpose of disclosure to the public is excluded from the definition of a "collection of information." *See* 5 CFR 1320.3(c)(2).

[241] This estimate is based on an averaging of the mean hourly wages for sales and financial managers provided by the Bureau of Labor Statistics. BUR. OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL EARNINGS IN THE UNITED STATES, 2008, tbl. 3, at 3-1 (2009), *http://www.bls.gov/ncs/ncswage2008.pdf* ("OCCUPATIONAL EARNINGS SURVEY").

500 MARS providers to prepare the required documents is $45,220 (500 providers x 2 hours each x $45.22 per hour).

(2) Recordkeeping Requirements

As noted above, the proposed Rule contemplates that MARS providers will create and retain records demonstrating their compliance with several obligations set forth in the Rule. Staff estimates that each of the estimated 500 providers will spend approximately 25 hours to institute procedures to monitor sales presentations. Although Commission staff cannot estimate with precision the time required to document compliance with the proposed Rule provisions, it is reasonable to assume that providers will each spend approximately 100 hours to do this. This includes preparing records demonstrating steps taken to seek payment for services performed, handling consumer complaints, and conducting training. Additionally, staff estimates that retention and filing of these records will require approximately 3 hours per year per provider.

Commission staff assumes that management personnel will prepare the required disclosures at an hourly rate of $45.22.[242] Based upon the above estimates and assumptions, the total labor cost to prepare the required documents to demonstrate compliance is $2,826,250 (500 providers x 125 hours each x $45.22 per hour).

Commission staff further assumes that office support file clerks will handle the proposed Rule's record retention requirements at an hourly rate of $13.24.[243] Based upon

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242 *Id.*

243 This estimate is based on mean hourly wages for office file clerks found at OCCUPATIONAL EARNINGS SURVEY, tbl. 3, at 3-22.

the above estimates and assumptions, the total labor cost to retain and file documents is $19,860 (500 providers x 3 hours each x $13.24 per hour).

D. Estimated Capital/Other Non-Labor Cost Burden

The proposed Rule should impose no more than minimal non-labor costs. Staff assumes that each of the estimated 500 MARS providers will make required disclosures in writing to approximately 1,000 consumers annually.[244] Under these assumptions, non-labor costs will be limited mostly to printing and distribution costs. At an estimated $1 per disclosure, total non-labor costs would be $1,000 per provider or, cumulatively for all providers, $500,000.

The Commission invites comments that will enable it to: (1) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collections of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

[244] Associated costs would be reduced if the disclosures are made electronically.

Appendix A – List of Commenters and Short-names/Acronyms

MARS Proposed Rule

Short-name/Acronym	Commenter
ABA	American Bankers Association
AFSA	American Financial Services Association
ALMSC	American Loss Mitigation Solutions Corp.
CRC	California Reinvestment Coalition, et al.
CMC	Consumer Mortgage Coalition
CSBS	Conference of State Bank Supervisors
CUNA	Credit Union National Association
Chase	Chase Home Finance, LLC
Gutner	John Gutner
HPC	Housing Policy Counsel
IL AG	Illinois Office of the Attorney General
MA AG	Massachusetts Office of the Attorney General
MBA	Mortgage Bankers Association
MN AG	Office of the Minnesota Attorney General
NAAG	National Association of Attorneys General
NAR	National Association of Relators
NCRC	National Community Reinvestment Coalition
NCLC	National Consumer Law Center, et al.
NCLR	National Council of La Raza
NYC DCA	New York City Department of Consumer Affairs
OTS	Office of Thrift Supervision
OH AG	Ohio Attorney General
Shriver	Sargent Shriver National Center on Poverty Law
TNLMA	The National Loss Mitigation Association

Appendix B – List of FTC MARS Law Enforcement Actions

MARS Proposed Rule

- *FTC v. First Universal Lending, LLC*, No. 09-CV-82322 (S.D. Fla. filed Nov. 24, 2009)
- *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009)
- *FTC v. Debt Advocacy Ctr, LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009)
- *FTC v. Kirkland Young, LLC*, No. 09-23507 (S.D. Fla. filed Nov. 18, 2009)
- *FTC v. 1st Guar. Mortgage Corp.*, No. 09-DV-61846 (S.D. Fla. filed Nov. 17, 2009)
- *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009)
- *FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 15, 2009)
- *FTC v. Infinity Group Servs.*, No. SACV09-00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009)
- *FTC v. Loan Modification Shop, Inc.*, No. 3:09-cv-00798 (JAP) (D.N.J., amended complaint filed Aug. 4, 2009)
- *FTC v. Apply2Save, Inc.*, No. 2:09-cv-00345-EJL-CWD (D. Idaho filed July 14, 2009)
- *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009)
- *FTC v. Sean Cantkier*, No. 1:09-cv-00894 (D.D.C., amended complaint filed July 10, 2009)
- *FTC v. LucasLawCenter "Inc.,"* No. SACV-09-770 DOC (ANX) (C.D. Cal. filed July 7, 2009)
- *FTC v. US Foreclosure Relief Corp.*, No. SACVF09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009)
- *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. filed June 1, 2009)
- *FTC v. Data Med. Capital, Inc.*, No. SA-CV-99-1266 AHS (Eex) (C.D. Cal., contempt application filed May 27, 2009)
- *FTC v. Dinamica Financiera LLC*, No. 09-CV-03554 CAS PJWx (C.D. Cal. filed May 19, 2009)
- *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009)
- *FTC v. Thomas Ryan*, No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009)
- *FTC v. Home Assure, LLC*, No. 8:09-CV-00547-T-23T-Sm (M.D. Fla. filed Mar. 24, 2009)
- *FTC v. New Hope Prop. LLC*, No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009)

- *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009)
- *FTC v. National Foreclosure Relief, Inc.*, No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009)
- *FTC v. United Home Savers, LLP*, No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008)
- *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008)
- *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008)
- *FTC v. Nat'l Hometeam Solutions, Inc.*, No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008)
- *FTC v. Safe Harbour Foundation of Florida, Inc.*, No. 08-C-1185 (N.D. Ill. filed Feb. 27, 2008).

VIII. Proposed Rule

List of Subjects in 16 CFR Part 322

Consumer Protection, Trade Practices, Telemarketing

Pursuant to the Omnibus Appropriations Act, as amended by the Credit CARD Act,[245] for the reasons set forth in the preamble, the Federal Trade Commission is proposing to amend title 16, Code of Federal Regulations, by adding a new part 322, to read as follows:

PART 322 – MORTGAGE ASSISTANCE RELIEF SERVICES RULE

Section Contents

[245] Pub. L. No. 111-8, § 626, 123 Stat. 524, as amended by Pub. L. No. 111-24, § 511, 123 Stat. 1734.

Authority: Pub. L. 111-8, § 626, 123 Stat. 524, as amended by Pub. L. No. 111-24, § 511, 123 Stat. 1734.

§ 322.1 Scope of regulations in this part.

This part implements the 2009 Omnibus Appropriations Act, Pub. L. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009), as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, § 511, 123 Stat. 1734 (May 22, 2009).

§ 322.2 Definitions.

(a) "Commercial communication" means any written or verbal statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial ("infomercial"), the Internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the term "commercial communication."

(b) "Consumer" means any natural person who owes on any loan secured by a dwelling.

(c) "Clear and prominent" means:

(1) In textual communications, the required disclosures shall be in a font easily read by a reasonable consumer, of a color or shade that readily contrasts with the background of the commercial communication, in the same language as each that is substantially used in the commercial communication, parallel to the base of the commercial communication, and, except as otherwise provided in this rule, each letter of the disclosure shall be, at a minimum, the larger of 12-point type or one-half the size of the largest letter or numeral used in the name of the advertised website or telephone number to which consumers are referred to receive information relating to any mortgage assistance relief service. Textual communications include any communications in a written or printed form such as print publications or words displayed on the screen of a computer;

(2) In communications disseminated orally or through audible means, such as radio or streaming audio, the required disclosures shall be delivered in a slow and deliberate manner and in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;

(3) In communications disseminated through video means, such as television or streaming video, the required disclosures shall appear simultaneously in the audio and visual parts of the commercial communication and be delivered in a manner consistent with paragraphs (c)(1) and (c)(2) of this section. The visual disclosure shall be at least

four percent of the vertical picture or screen height and appear for the duration of the oral disclosure;

(4) In communications made through interactive media, such as the Internet, online services, and software, the required disclosures shall be (i) consistent with paragraphs (c)(1), (c)(2), and (c)(3) of this section, (ii) made on a separate landing page immediately prior to the page on which the consumer takes any action to incur any financial obligation, (iii) unavoidable, *e.g.*, visible to consumers without requiring them to scroll down a webpage, and (iv) appear in type at least twice the size as any hyperlink to the company's website or display of the Uniform Resource Locator of the company's website;

(5) In all instances, the required disclosures shall be presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them; and

(6) For program-length television, radio, or Internet-based multi-media commercial communications, the required disclosures shall be made at the beginning, near the middle, and at the end of the commercial communication.

(d) "Dwelling" means a residential structure containing four or fewer units, whether or not that structure is attached to real property, that is primarily for personal, family, or household purposes. The term includes any of the following if used as a residence: an individual condominium unit, cooperative unit, mobile home, or trailer.

(e) "Dwelling loan" means any loan secured by a dwelling, and any associated deed of trust or mortgage.

(f) "Dwelling Loan Holder" means the person who holds a loan secured by a dwelling.

(g) "Material" means likely to affect a person's choice of, or conduct regarding, any mortgage assistance relief service.

(h) "Mortgage Assistance Relief Service" means any service, plan, or program, offered or provided in exchange for consideration on behalf of the consumer, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following:

(1) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

(2) Stopping, preventing, or postponing any (i) mortgage or deed of trust foreclosure sale for a dwelling or (ii) repossession of the consumer's dwelling, or otherwise save the consumer's dwelling from foreclosure or repossession;

(3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

(4) Negotiating, obtaining, or arranging any extension of the period of time within which the consumer may (i) cure his or her default on a dwelling loan, (ii) reinstate his or her dwelling loan, (iii) redeem a dwelling, or (iv) exercise any right to reinstate a dwelling loan or redeem a dwelling;

(5) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

(6) Negotiating, obtaining, or arranging (i) a short sale of a dwelling, (ii) a deed-in-lieu of foreclosure, (iii) or any other disposition of a dwelling other than a sale to a third party that is not the dwelling loan holder.

(i) "Mortgage Assistance Relief Service Provider" means any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service. This term does not include:

(1) The dwelling loan holder, or any agent of such person, provided that any such agent does not claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit;

(2) The servicer of a dwelling loan, or any agent of such person, provided that any such agent does not claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit; and

(3) Any nonprofit, bank, thrift, federal credit union, or other person specifically excluded from the Federal Trade Commission's jurisdiction pursuant to 15 U.S.C. 44 and 45(a)(2).

(j) "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(k) "Servicer" means the person responsible for receiving any scheduled periodic payments from a consumer pursuant to the terms of any dwelling loan, including amounts for escrow accounts under section 10 of the Real Estate Settlement Procedures Act (12 U.S.C. 2609), and making the payments of principal and interest and such other payments with respect to the amounts received from the consumer as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract.

§ 322.3 Prohibited representations.

It is a violation of this rule for any mortgage assistance relief service provider to engage in the following conduct:

(a) Representing, expressly or by implication, in connection with the advertising, marketing, promotion, offering for sale, or sale of any mortgage assistance relief service that a consumer cannot or should not contact or communicate with his or her lender or servicer.

(b) Misrepresenting, expressly or by implication, any material aspect of any mortgage assistance relief service, including but not limited to:

(1) The likelihood of negotiating, obtaining, or arranging any represented service or result, such as those set forth in § 322.2(h);

(2) The amount of time it will take the mortgage assistance relief service provider to accomplish any represented service or result, such as those set forth in § 322.2(h);

(3) That a mortgage assistance relief service is affiliated with, endorsed or approved by, or otherwise associated with (i) the United States government, (ii) any governmental homeowner assistance plan, (iii) any federal, state, or local government agency, unit, or department, (iv) any nonprofit housing counselor agency or program, (v) the maker, holder or servicer of the consumer's dwelling loan, or (vi) any other person or program;

(4) The consumer's obligation to make scheduled periodic payments or any other payments pursuant to the terms of the consumer's existing dwelling loan;

(5) The terms or conditions of the consumer's dwelling loan, including but not limited to the amount of debt owed;

(6) The terms or conditions of any refund, cancellation, exchange, or repurchase policy for a mortgage assistance relief service, including but not limited to the likelihood of obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted, for a mortgage assistance relief service; or

(7) That the mortgage assistance relief service provider has completed the represented services, as specified in § 322.5, or otherwise has a right to claim, demand, charge, collect, or receive payment or other consideration.

§ 322.4 Required disclosures.

It is a violation of this rule for any mortgage assistance relief service provider to engage in the following conduct:

(a) Failing to place the following statement, in a clear and prominent manner, in every commercial communication for any mortgage assistance relief service:

> "(Name of company) is a for-profit business not associated with the government. This offer has not been approved by the government or your lender."

In textual communications except for communications not covered by paragraph (b) of this section, the required disclosure also must be preceded by the statement "IMPORTANT NOTICE" in bold-face type.

(b) Failing to disclose, in a clear and prominent manner, in every communication directed at a specific consumer that promotes the sale of any mortgage assistance relief

service and occurs prior to the consumer entering into any agreement for the purchase of such service, the following information:

(1) "You will have to pay (insert amount) for this service." For the purposes of this paragraph, the amount "you will have to pay" shall consist of the total amount the consumer must pay to purchase, receive, and use all of the mortgage assistance relief services that are the subject of the sales offer, including, but not limited to, all fees, charges, or penalties;

(2) "(Name of company) is a for-profit business not associated with the government. This offer has not been approved by the government or your lender;" and

(3) In cases where the provider advertises any represented service or result set forth in § 322.2(h) other than paragraph (h)(2), "Even if you buy our service, your lender may not agree to change your loan."

In textual communications, the required disclosures also must appear together under the following heading,"IMPORTANT NOTICE: Carefully consider this information before buying this service." The heading must be in bold face font that is two point-type larger than the font size of the required disclosures. In communications disseminated orally or through audible means, wholly or in part, the audio component of the required disclosures must be preceded by the statement "Please consider carefully the following information before buying this service." In telephone communications, the required disclosures must be made at the beginning of the call.

§ 322.5 Prohibition on collection of advance payments.

(a) It is a violation of this rule for any mortgage assistance relief service provider to request or receive payment of any fee or other consideration until the provider has:

(1) achieved all of the results (i) the provider represented, expressly or by implication, to the consumer that the service would achieve, and (ii) that are consistent with consumers' reasonable expectations about the service; and

(2) provided the consumer with documentation of such achieved results.

(b) In cases where the provider has represented, expressly or by implication, that it will negotiate, obtain, or arrange a modification of any term of any dwelling loan, the provider shall not request or receive any payment or other consideration until it has:

(1) obtained a mortgage loan modification for the consumer; and

(2) provided the consumer documentation of the mortgage loan modification in the form of a written offer from the dwelling loan holder or servicer to the consumer.

(c) For the purposes of paragraph (b) of this section, "mortgage loan modification" means:

(1) the contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments, where the change is (i) permanent for a period of five years or more; or (ii) will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less.

§ 322.6 Assisting and facilitating.

It is a violation of this rule for a person to provide substantial assistance or support to any mortgage assistance relief service provider when that person knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this rule.

§ 322.7 Exemptions.

(a) A person licensed to practice law in the state in which the consumer resides is exempt from § 322.3(a) of this rule.

(b) A person licensed to practice law in the state in which the consumer resides is not prohibited under § 322.5 from requesting or receiving compensation if such person complies with all applicable state laws, including licensing regulations, in connection with preparing or filing:

(1) A bankruptcy petition or any other document that must be filed in a bankruptcy proceeding; or

(2) Any document that must be filed in connection with a court or administrative proceeding.

§ 322.8 Waiver not permitted.

Any attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of the rule.

§ 322.9 Recordkeeping and compliance requirements.

(a) Any mortgage assistance relief provider must keep, for a period of twenty-four (24) months from the date the record is produced, the following records:

(1) all contracts or other agreements between the provider and any consumer for any mortgage assistance relief service;

(2) copies of all written communications between the provider and any consumer occurring prior to the date on which the consumer enters into a contract or other agreement with the provider for any mortgage assistance relief service;

(3) copies of all documents or telephone recordings created in connection with compliance with paragraph (b) of this section.

(4) all consumer files containing the names, phone numbers, dollar amounts paid, quantity of items or services purchased, and descriptions of items or services purchased, to the extent such information is obtained in the ordinary course of business;

(5) copies of all materially different sales scripts, training materials, commercial communications, or other marketing materials, including websites and weblogs; and

(6) copies of the documentation provided to the consumer as specified in § 322.5 of this part.

(b) A mortgage assistance relief service provider must:

(1) take reasonable steps sufficient to monitor and ensure that all employees and independent contractors comply with this rule. Such steps shall include the monitoring of sales presentations with customers, and shall also include, at a minimum, the following: (i) performing random, blind tape recording and testing of the oral representations made by persons engaged in sales or other customer service functions; (ii) establishing a procedure for receiving and responding to consumer complaints; and (iii) ascertaining the number and nature of consumer complaints regarding transactions in which all employees and independent contractors are involved;

(2) investigate promptly and fully any consumer complaint received;

(3) take corrective action with respect to any employee or independent contractor whom the mortgage assistance relief service provider determines is not complying with this rule, which may include training, disciplining, or terminating such person; and

(4) maintain documentation of its compliance with paragraphs (b)(1)-(3) of this section.

(c) A mortgage assistance relief provider may keep the records required by § 322.9 (a) and (b) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required under § 322.9 (a) and (b) shall be a violation of this rule.

§ 322.10 Actions by states.

Any attorney general or other officer of a state authorized by the state to bring an action under this part may do so pursuant to Section 626(b) of the 2009 Omnibus Appropriations Act, Pub. L. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009), as amended by Pub. L. 111-24, § 511, 123 Stat. 1734 (May 22, 2009).

§ 322.11 Severability.

The provisions of this rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark
Secretary